

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION



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COMMISSION DECISIONS

Z.B. HOUSER

v.

NORTHWESTERN RESOURCES COMPANY

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Docket No. WEST 83-101-D

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This proceeding involves a discrimination complaint brought by the Secretary of Labor on behalf of Zimmie B. Houser. The complaint alleges that Northwestern Resources Company ("Northwestern") violated section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1982), when it failed to recall Houser to work after he had been laid off due to a production shutdown of the mine. Northwestern contends that Houser was not recalled because of his unsatisfactory work performance. Following a hearing on the merits, a Commission administrative law judge concluded that Northwestern did not violate section 105(c) of the Mine Act, and the judge dismissed the discrimination complaint. 6 FMSHRC 1798 (July 1984)(ALJ). For the reasons stated below, we affirm this result.

On October 1, 1981, Northwestern hired Mr. Houser to work as a crusher operator at its Grass Creek Mine, a surface coal mine located at Grass Creek, Wyoming. The Grass Creek Mine was managed for Northwestern by Monte Steffans. Roger Sprague was employed as the working foreman.

Effective January 1, 1982, Houser was transferred from Grass Creek to Northwestern's small load-out facility at Kirby, Wyoming, approximately 60 miles from Grass Creek. (Only one employee worked at the Kirby facility.) Coal from the mine was trucked to the load-out facility where it was dumped, stockpiled, and loaded into railroad cars. The facility was located about 400 yards from Houser's home. At Kirby, Houser was responsible for keeping the dump area clean so that trucks could unload. Houser was responsible also for loading the coal into waiting railroad cars for shipment to Northwestern's customers.

transfer, Sprague had received complaints about Houser's job performance at Kirby. Sprague testified that several truckers complained that they had to wait for Houser to come to the load-out site in order to unload their coal. Sprague also testified that Houser overloaded the railroad cars and did not maintain satisfactorily the front-end loader that he operated. When Houser returned to Grass Creek, he was assigned to the night shift. Approximately one month later, the night shift was suspended and Houser was transferred to the day shift. With this transfer, the day shift consisted of Houser, four other miners, and the foreman, Sprague.

During the spring of 1982, Houser made various complaints to Sprague about the health and safety conditions at Grass Creek. Houser complained about the amount of dust in the pit, that the windows on the front-end loader that he operated were too small, and that coal dust was entering the cab through a broken windshield. Houser told Sprague that he was afraid of contracting pneumoconiosis or some other disease because of the amount of dust that he was inhaling. He testified that on some days there was as much dust inside the cab as there was outside the cab. Houser also complained to Sprague about the safety of the steering mechanism on the front-end loader. Sprague agreed that the steering mechanism was defective and he had it repaired.

In May 1982, as a result of dust samples taken during the course of a regular inspection, Northwestern was issued a citation alleging that respirable dust in Houser's designated occupation exceeded the applicable limits.

During June 1982, as a result of losing one of its major customers, Northwestern laid-off miners at Grass Creek and Kirby. On June 11, 1982, Mine Manager Steffans announced that four miners, including Houser, would be laid off. In ranking the four miners who were laid off Steffans ranked Houser as third best. The four miners were given their termination notices signed by Steffans and Sprague. Houser's job knowledge exceeded requirements and his work, and Houser's personal relationships. However, it also noted that Houser's attitude was poor. Finally, the notice stated that Houser was laid off.

After he was laid off, Houser met Steffans in conversation, Steffans indicated that the two miners would be recalled. On July 19, 1982, the two miners were recalled to work at Grass Creek. In July 1982, when Houser found out about the recall, he contacted Steffans and asked why he had not been recalled. Steffans told him that he was not recalled because Sprague

because during the course of his employment: (1) he did not maintain his equipment properly; (2) he was frequently absent from the job site at Kirby; (3) he did not keep the Kirby facility clean; and (4) he did not obey Sprague's orders concerning the manner in which he loaded coal.

The Secretary of Labor filed a discrimination complaint with the Commission on Houser's behalf. After an evidentiary hearing, the judge found that Houser's complaints regarding the coal dust in the pit and the steering mechanism on the front-end loader were protected by the Mine Act. 6 FMSHRC at 1806. The judge further concluded that Houser was not recalled to work in part because of his protected activities. Id. at 1809. Turning to Northwestern's argument that it did not recall Houser because of his overall poor job performance, the judge stated that when an operator produces evidence that a failure to rehire is based upon a legitimate business purpose, the burden is upon the complainant to establish that he would have been rehired "but for" his protected activity. 6 FMSHRC at 1809-10, quoting text from Wayne Boich d.b.a. W.B. Coal Co. v. FMSHRC, 704 F.2d 275, 284 (6th Cir. 1983). The judge found that Houser did not establish that he would have been rehired "but for" his protected activity because Houser's job performance was, in fact, unsatisfactory. 6 FMSHRC at 1810.

On review, Houser argues that the judge did not apply the proper legal test to determine whether he was the victim of unlawful discrimination. He also argues that the judge's findings of fact and the judge's conclusions are not supported by substantial evidence.

Upon reviewing the analytical framework of the judge's decision, we conclude that it is deficient in some respects. Nevertheless, we have reviewed the record as a whole carefully, and conclude that, with certain clarifications, the judge's ultimate determination that Northwestern's failure to recall Houser did not violate the Mine Act is supported by substantial evidence and consistent with properly applied precedent. See Secretary of Labor on behalf of Sedgmer et al. v. Consolidation Coal Co. 8 FMSHRC 303, 306 (March 1986); Gravelly v. Ranger Fuel Corp., 6 FMSHRC 799 (April 1984), aff'd sub. nom. Gravelly v. Ranger Fuel Corp. & FMSHRC, 765 F.2d 138 (4th Cir. 1985).

To establish a prima facie case of discrimination a complaining miner bears the burden of production and proof to show (1) that he engaged in protected activity, and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasu v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub. nom. Consolidated Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co. 3 FMSHRC 803, 817-18 (April 1981). The operator may

that it was also motivated by the miner's unprotected activity, and that it would have taken the adverse action in any event for the unprotected activity alone. The operator bears the burden of proof with regard to this affirmative defense, Haro v. Magma Copper Co., 4 FMHRC 1935, 1936-38 (November 1982), but the ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 818 n. 20. See also Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984) and Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (both cases specifically approving the Commission's Pasula-Robine test).

With respect to the first element of the prima facie case, the judge's finding that during the spring of 1982 Houser made several complaints to Sprague about the dust at Grass Creek, the condition of the windows and the windshield of the cab of the front-end loader, and the steering mechanism of the front-end loader are supported by substantial evidence. We agree with the judge that these complaints constitute protected activity under the Mine Act. 6 FMSHRC at 1807.

The judge's finding that the second element of the prima facie case was established is also supported by substantial evidence. The record indicates that Houser was the most vocal of the miners concerning health and safety matters. Also, MSHA's citation of Northwestern for excessive respirable dust came at about the same time as Houser's complaints to mine management about the dust. Further, there is testimony that after failing to recall Houser, Sprague told one of the other miners that Houser was a "troublemaker." As the judge correctly noted, inferences of an operator's motivation may be drawn from such circumstantial evidence. 6 FMSHRC at 1809.

However, a crucial issue remains -- the adequacy of Northwestern's affirmative defense. In reciting the test to be applied for determining whether a violation of section 105(c) of the Mine Act occurs when an operator is motivated in any part by the exercise of protected activity, the judge stated the law incorrectly. The judge quoted and appeared to in part rely upon the Sixth Circuit's decision in Wayne Boich d.b.a. W. Coal Co., v. FMSHRC, 704 F.2d 275 (6th Cir. 1983), in which the Court had declined to approve the Commission's test regarding the manner in which an operator may affirmatively defend against a prima facie case. The judge, however, apparently was unaware that on reconsideration, the Sixth Circuit reversed itself and approved the Commission's test. Boich, 719 F.2d at 195-96. Thus, the correct inquiry is whether Northwestern would have refused to rehire Houser, in any event, for his unprotected activity alone. The judge's decision also provides his answer to this question. In his conclusion of law number 3 the judge stated: "Northwestern proved by a preponderance of the evidence that Houser was not rehired for reasons of unprotected activity."

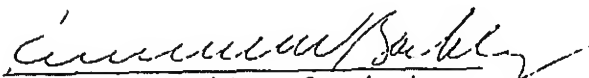
from the truckers he had gone to Kirby on several occasions to check on Houser's attendance and that on some occasions he had to wait at least 45 minutes during normal work hours for Houser to arrive. Further, Houser was insubordinate from time to time. Sprague testified that during January 1982 the front-end loader that Houser usually operated at Kirby was not working and that a smaller substitute loader had to be used. Although Houser did not question the safety of using the smaller loader, he nonetheless refused to load the stockpiled coal into the waiting railroad cars. Because of his work refusal on that occasion, Houser was sent home and Sprague was forced to load the coal himself. Sprague testified that the next day he informed Steffans that Houser had refused to load the railroad cars and recommended that he be discharged. Sprague had received other complaints about Houser's work at Kirby. He testified that Houser frequently overloaded railroad cars and, as a result, the company was forced to expend funds to send two men 80 miles to the railroad yard to shovel excess coal out of the cars. After Houser was replaced at Kirby, Sprague testified that the railroad cars were seldom overloaded and that complaints about the work at Kirby were "almost nonexistent."


Two coal truck drivers who were familiar with Houser's work at Kirby also testified as to his poor job performance. Carl Bechtold testified that Houser did not keep the load-out facility clear so that coal could be dumped from his truck. Bechtold stated that frequently he had to wait for the area to be cleared; in fact, he said, this happened about twice a week during December 1982. He also complained that frequently Houser was not present at the load-out facility when he arrived to dump his coal. Bechtold testified that he brought Houser's absences to the attention of Sprague and Steffans. Thomas Anderson, whose trucks transported coal from Grass Creek to Kirby, estimated that he had contact with Houser on a daily basis. He testified that he and his men often had to wait for Houser to arrive at the facility in order to unload their trucks, even though Houser's home was only 400 yards away. Anderson also testified that Houser did not maintain properly the load-out facility. On some occasions the trucks could not be unloaded because the area was not levelled off and there was no room to dump the coal. Mr. Anderson testified further that he complained about Houser to Sprague and Steffans.

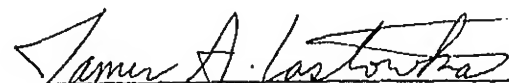
Moreover, Sprague testified that Houser did not properly maintain the equipment that he operated. Sprague testified that Northwestern instructs each employee to monitor equipment constantly for missing or broken parts and that each employee is also responsible for the routine maintenance of equipment. Sprague testified that Houser was lax in replacing fittings and headlights and in maintaining pins on the front-end loader. Further, Sprague testified that the glass windows on the

worker. The judge, however, found that the statements of Houser were general in nature, as opposed to the more detailed and specific testimony of Steffans and the truckers. Moreover, none of the miners who testified on Houser's behalf had immediate knowledge of Houser's job performance at Kirby. Given the particularized nature of the testimony of Northwestern's witnesses and the judge's first-hand observation of the witnesses at the hearing, we find no reason for overturning the judge's credibility determinations and his resolutions of conflicting testimony. See, e.g., Ribel v. Eastern Associated Coal Corp., 7 FMSHRC 2015, 2021 (December 1985), petitions for review filed, Nos. 86-3832(L) & 86-3833 (4th Cir. March 31, 1986). 1/

Accordingly, we conclude that the record and the judge's findings establish that Northwestern would not have recalled Houser to work in any event due to his poor work performance. Thus, we hold that the discrimination complaint was properly dismissed and affirm the judge's decision on the bases discussed above. 2/


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

1/ Houser's termination notice, which indicated that he was recommended for rehire, was accorded little weight by the judge and is contrary to the substantial evidence recited above concerning his job performance.

2/ Chairman Ford did not participate in the consideration or disposition

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CONSOLIDATION COAL COMPANY

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

CONSOLIDATION COAL COMPANY,

UNITED MINE WORKERS OF AMERICA,
Intervenor

Docket No. WEVA 82-209-R

Docket No. WEVA 82-245

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This case presents a question of major importance in the enforcement of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. et seq. (1982), concerning overexposure to respirable dust in coal mines: What are the appropriate criteria for determining whether a violation of 30 C.F.R. § 70.100(a), based upon designated occupational sampling results obtained pursuant to 30 C.F.R. § 70.207, is of such nature as could significantly and substantially contribute to the

§ 814(d)(1). See n. 3, *infra*. Judge Brodick determined that the violation was properly designated as significant and substantial, and assessed a civil penalty of \$150. 5 FMSHRC 378 (March 1983)(ALJ). We granted Consol's petition for discretionary review, permitted the participation of several amici curiae, and heard oral argument. 2/

We conclude that the test first set forth in Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981), with certain adaptations appropriate in the context of this exposure-related health standard, is applicable in determining whether a violation of section 70.100(a), based upon designated

1/ 30 C.F.R. § 70.100(a) provides:

Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of each mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air as measured with an approved sampling device and in terms of an equivalent concentration determined in accordance with § 70.206 (Approved sampling devices; equivalent concentrations).

30 C.F.R. § 70.207 provides in part:

(a) Each operator shall take five valid respirable dust samples from the designated occupation in each mechanized mining unit during each bimonthly period beginning with the bimonthly period of November 1, 1980. Designated occupation samples shall be collected on consecutive normal production shifts or normal production shifts each of which is worked on consecutive days. The bimonthly periods are:

January 1	-	February 28 (29)
March 1	-	April 30
May 1	-	June 30
July 1	-	August 31
September 1	-	October 31
November 1	-	December 31.

2/ The following amici curiae participated in review proceedings before the Commission: the American Mining Congress, Emery Mining Corporation, the United Steelworkers of America, the International Chemical Workers Union, and the Council for the Southern Mountains.

Consol operates the Blacksville No. 1 mine, in Boone County, West Virginia. On January 20-24, 1982, pursuant to the designated occupation sampling requirements of the Department of Labor's Mine Safety and Health Administration ("MSHA"), Consol collected five respirable dust samples for the continuous miner occupation in section 026-0, a mechanized mining unit. The samples were collected with an approved sampling device operated by a certified person. As required by 30 C.F.R. § 70.209(a), Consol submitted the samples to MSHA for analysis. The operator included a request that MSHA check the samples for contamination, rock dust, and oversized particles. MSHA's weight analysis of the samples revealed respirable dust concentrations of 8.1, 0.4, 5.1, 6.3 and 0.7 milligrams of respirable dust per cubic meter of air (mg/m³). The average concentration for the five samples was 4.1 mg/m³. MSHA did not microscopically examine the samples for contamination, rock dust, or oversized particles.

On the basis of these test results, an MSHA inspector issued a citation to Consol under § 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleging that miners had been exposed to an average respirable dust concentration of 4.1 mg/m³ in violation of section 70.100(a). The inspector, following MSHA enforcement policy guidelines, designated the violation as significant and substantial. 3/ The citation was terminated

3/ Section 104(d)(1) of the Mine Act provides:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this chapter. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section to be withdrawn from, and to be prohibited from entering such area

Before the administrative law judge, Consol conceded a violation of 30 C.F.R. § 70.100(a). The primary focus of Consol's argument and the judge's decision was on whether the violation was of such nature as could significantly and substantially contribute to the cause and effect of a coal mine health hazard. In upholding the MSHA inspector's finding, the judge relied in part on the Commission's National Cypsum test for determining the existence of a significant and substantial violation of a safety standard and on the detailed medical evidence presented by the parties. 5 FMSHRC at 388-90. 4/

The judge found that chronic bronchitis and black lung disease, technically known as coal workers' pneumoconiosis ("pneumoconiosis"), can result from cumulative exposure to respirable dust in coal mines. 5 FMSHRC at 381-382. Chronic bronchitis, which can be disabling, is an inflammation of the bronchial tubes that results in a chronic productive cough and loss of lung function. 5 FMSHRC at 381. Pneumoconiosis, as the judge stated, is:

a lung disease caused by the deposition of coal dust on the human lung and the body's reaction to it. The dust accumulates in the small airways and the macrophagia of the lungs are unable to clear it. Continuous exposure to coal dust may cause the condition to spread and to involve most parts of the lung. In some individuals the condition may progress to progressive massive fibrosis which involves the destruction of alveoli and distortion of the remaining lung tissue.

Id. 5/ Evaluating the medical evidence, the judge found that the over-exposure in this case to an average respirable dust concentration of 4.1 mg/m³, in and of itself, would not cause or significantly contribute to chronic bronchitis or pneumoconiosis. 5 FMSHRC at 389. However, he

4/ The judge also concluded that, in appropriate instances, an inspector may make a significant and substantial finding in a section 104(a) citation. 5 FMSHRC at 388. The Commission resolved this issue subsequently in Consolidation Coal Co., 6 FMSHRC 189 (February 1984). The judge's conclusion is consistent with the Commission's holding in Consolidation Coal and, therefore, we affirm the judge's decision in this regard and limit our discussion to the remaining issues raised on review.

5/ Simple pneumoconiosis is asymptomatic and diagnosed by X-ray examination. Complicated pneumoconiosis, or progressive massive

twice the allowable maximum dust level. In his view. 5 FMSHRC at 389 n. 4. The judge concluded that each episode of overexposure significantly and substantially contributes to the health hazard of contracting chronic bronchitis or pneumoconiosis, diseases of a reasonably serious nature. 5 FMSHRC at 389-90.

II.

We first discuss the proper test for determining whether a violation of section 70.100(a) is significant and substantial, evaluate Consol's assertions that MSHA's dust sampling methods are fatally flawed, and then apply our test to the facts of the present case.

In National Gypsum, the Commission held:

[A] violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

3 FMSHRC at 825. Consonant with the Mine Act's significant and substantial phraseology and the Act's overall enforcement scheme, we stated:

[A] violation "significantly and substantially" contributes to the cause and effect of a hazard if the violation could be a major cause of a danger to safety or health. In other words, the contribution to cause and effect must be significant and substantial.

3 FMSHRC at 827 (footnote omitted). See also U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984); Consolidation Coal Co., 6 FMSHRC 34, 37 (January 1984); Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). Thus, the violation must be a major cause of a danger to safety or health. 6/

6/ Although the language of National Gypsum speaks to the hazards created by violations of both mandatory safety and health standards, it is important to note that until now the Commission has had occasion to review application of the test only in cases involving violations of mandatory safety standards. See, e.g., Mathies Coal Co., 6 FMSHRC at 3 n. 4. In applying and interpreting the test as it here relates to a violation of 70.100(a), a health standard, we imply no change in the

sequent to National Gypsum, the Secretary altered his enforcement policy with regard to significant and substantial violations. MSHA, Policy Memorandum (May 6, 1981). The revised policy recapitulates the Commission's National Gypsum test regarding safety standard violations. With respect to violations involving health standards, however, the Policy Memorandum provides:

[V]iolations involving mandatory health standards which limit exposure to or require protection from harmful airborne contaminants, toxic substances or harmful physical agents should be designated as "significant and substantial." MSHA believes that noncompliance with this type of health standard involves a reasonable likelihood of injury or illness which will be reasonably serious. The use of personal protective equipment (PPE), however, should be taken into account. Although the use of PPE may not constitute compliance with health standards that set an exposure limit, the use of PPE by miners affected by the violation is relevant to determining whether any injury or illness is reasonably likely to occur.

MSHA's Policy Memorandum makes clear that the use of personal protective equipment by miners affected by the violation is relevant to its determination of whether any injury or illness is likely to occur. MSHA's Policy Memorandum also states that violations of mandatory health standards that do not involve an exposure-related standard, or are only technical, will not be treated by MSHA as significant and substantial violations.

As the above-quoted portions of MSHA's Policy Memorandum indicate, the Secretary's enforcement approach does not precisely parallel National Gypsum with respect to an exposure-related health hazard. As explained below, however, in the particular context of the control of respirable dust in coal mines some departure is justified because of fundamental differences between a typical safety hazard and the respirable dust exposure-related health hazard at issue.

An examination of the statutory text and the legislative history of the Mine Act reveals a clear congressional understanding of the unique nature of the exposure-related health hazards of respirable dust and the control of those hazards. Indeed, prevention of pneumoconiosis and other occupational illnesses is a fundamental purpose underlying the Mine Act. Congress' concern is first expressed in section 2 of the Act:

in order to prevent occupational diseases originating in such mines [.]

30 U.S.C. § 801(c)(emphasis added). Section 201(b) of the Act, 30 U.S.C. § 841(b), describes the coverage and intent of the interim mandatory health standard regarding respirable dust concentrations. That section stresses the prevention of any disability from pneumoconiosis or any other occupation-related disease:

Among other things, it is the purpose of this subchapter to provide, to the greatest extent possible, that the working conditions in each underground coal mine are sufficiently free from respirable dust concentrations in the mine atmosphere to permit each miner the opportunity to work underground during the period of his entire adult working life without incurring any disability from pneumoconiosis or any other occupation-related disease during or at the end of such period.

30 U.S.C. § 841(b).

The respirable dust standard involved in the present case, section 70.100(a), is taken directly from section 202 of the Mine Act, 30 U.S.C. § 842, which, in turn, was carried over without significant change from the 1969 Coal Act. These statutory sections set interim mandatory health standards, which the Secretary has adopted. When these standards limiting miners' exposure to respirable dust in coal mines were drafted in 1969, Congress recognized a direct relationship between reductions of respirable dust in the mine atmosphere and corresponding reductions in the incidence of disabling respiratory disease in coal miners. See, e.g., S. Rep. No. 411, 91st Cong., 1st Sess. 14-17 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., 1 Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 141-43 (1975) ("1969 Legis. Hist."). See also 1969 Legis. Hist. 355-58; H. Rep. No. 563, 91st Cong., 1st Sess. 15-20 (1969), reprinted in 1969 Legis. Hist. 1045-50; 1969 Legis. Hist. 1195-99. With regard to its ultimate decision to adopt a 2.0 mg/m³ respirable dust standard, Congress recognized that in a dust environment below approximately 2.2 mg/m³, there would be virtually no probability of a miner's contracting complicated coal workers' pneumoconiosis even after 35 years of exposure at that level. H. Rep. No. 563, supra, at 18, reprinted in 1969 Legis. Hist. 1048; 1969 Legis. Hist. 1197-98. The legislative history also reflects awareness that a standard at or below 2.2 mg/m³ would produce no danger of miners developing disabling disease. Id.; 1969 Legis. Hist. 1277.

In all cases, the standard is keyed to each individual miner. The air he breathes, wherever he works in the mine, must not contain more respirable dust during any working shift than the standard permits.

1969 Legis. Hist. 1606 (emphasis added). Congress plainly intended the 2.0 mg/m³ standard it adopted to be the maximum permissible exposure level in order to achieve its goal of preventing disabling respiratory disease. Also, Congress clearly intended the full use of the panoply of the Act's enforcement mechanisms to effectuate this congressional goal, including the designation of a violation as a significant and substantial violation. It is against the background of Congress' firm intent to prevent respiratory disease by setting permissible levels of miners' exposure to respirable dust that we turn to the question of the proper test for determining whether a violation of section 70.100(a), based upon excessive designated occupation samples, is a significant and substantial violation.

In Mathies Coal Co., *supra*, the Commission further discussed the elements that establish, under National Gypsum, whether a violation of a mandatory safety standard is significant and substantial:

[T]he Secretary ... must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC at 3-4 (footnote omitted).

Adapting this test to a violation of a mandatory health standard, such as section 70.100(a), results in the following formulation of the necessary elements to support a significant and substantial finding: (1) the underlying violation of a mandatory health standard; (2) a discrete health hazard--a measure of danger to health--contributed to by the violation; (3) a reasonable likelihood that the health hazard contributed to will result in an illness; and (4) a reasonable likelihood that the illness in question will be of a reasonably serious nature.

designated occupation samples, has occurred, a presumption arises
the third element of the significant and substantial test--a reason-
likelihood that the health hazard contributed to will result in an
s--has been established.

the fourth element of the significant and substantial test, a
able likelihood that the illness in question will be of a reason-
serious nature, is not seriously disputed. Congress noted not only
onomic losses to the nation caused by respirable dust induced
es, but also the "immeasurable cost of human pain and suffering."
. No. 411, supra, at 17, reprinted in 1969 Legis. Hist. 143.
r, the judge found that complicated pneumoconiosis entails the
ction of the lungs' air exchange capabilities and distortion of
remaining lung tissue. Progressive massive fibrosis also significantly
s the functional capacity of the lungs through extensive internal
ng, contracture of the lungs with compensatory emphysema, and loss
vasculature. Progressive massive fibrosis commonly causes shortness
ath and cough, and can cause progressive pulmonary impairment and
death. The above facts support a conclusion that there is a
able likelihood that illness resulting from overexposure to respira-
st will be of a reasonably serious nature.

we recognize that the essence of the above discussion of each of
ur elements of the significant and substantial test would be the
n all instances where the Secretary proves a violation of section
(a) based upon designated occupation samples. Therefore, rather
requiring the Secretary to prove anew all four elements in each
we hold that when the Secretary proves that a violation of 30 C.F.R.
100(a), based upon excessive designated occupation samples, has
ed, a presumption that the violation is a significant and substantial
ion is appropriate. We further hold that this presumption that
olation is significant and substantial may be rebutted by the
or by establishing that miners in the designated occupation in
ere not exposed to the hazard posed by the excessive concentration
pirable dust, e.g., through the use of personal protective equipment. 7/

thus, with these adaptations, we extend the application of the
Al Gypsum test to the determination of whether a violation of
n 70.100(a), based upon excessive designated occupation samples,
nificant and substantial.

SHA's policy memorandum, quoted supra, recognizes that the use of
ntial finding in connection with violations of 30 C.F.R. § 70.100(a).

dust samples existed for the entire bimonthly reporting period. We do not agree. MSHA's designated occupation respirable dust sampling regulation, section 70.207 (n. 1, supra), divides the calendar year into six distinct bimonthly periods. By establishing a series of fixed periods for sampling, as opposed to providing for a series of periodic samples, the standard evidences an intent that the five respirable dust samples taken during each bimonthly period will be viewed as representative of the mine atmosphere for that particular period. Perhaps other sampling methodology could be devised, but we cannot conclude that the bimonthly method chosen by the Secretary is unreasonable or otherwise impermissible. The judge correctly interpreted the standard and properly held that the 4.1 mg/m³ average concentration of the five respirable dust samples exemplified the mine atmosphere over the course of the entire bimonthly sampling period.

Consol also argues that the variability encountered in the sampling procedure produces results that are not representative of the mine atmosphere; that mistreatment or malfunction of sampling devices may lead to collection of more dust than intended; that sampling devices collect materials other than respirable coal dust; that sampling devices may collect non-respirable, oversized dust particles; and that the dust samples that are collected do not reflect individual miner exposures.

In American Mining Congress v. Marshall, 671 F.2d 1215 (10th Cir. 1982), the Tenth Circuit considered MSHA's designated area sampling regulations, substantially the same regulations at issue here. There, the American Mining Congress challenged the Secretary's regulations on both substantive and procedural grounds, alleging that the Secretary had acted in an arbitrary and capricious fashion in promulgating the regulations. The Tenth Circuit dismissed the petition for review, holding that the Secretary's promulgation of the respirable dust sampling program was not arbitrary and capricious. On review, Consol offers variations of the arguments advanced and rejected in the standards promulgation case. It attempts to distinguish those arguments challenging the test results for purposes of issuing a citation from those designating the violation as significant and substantial.

We adopt the initial perspective that all sampling methods fall short of perfection and are designed to provide best estimates of actual conditions. As the Tenth Circuit aptly observed:

Since measurement error is inherent in all sampling, the very fact that Congress authorized a sampling program indicates that it intended some error to be tolerated in enforcement of the dust standard.

multiple shift sampling, 30 U.S.C. § 70.207; certification of persons collecting samples, 30 C.F.R. §§ 70.202 and 70.203; periodic calibration of sampling devices, 30 C.F.R. § 204; and periodic inspection, testing, and maintenance of sampling devices, id. The results obtained under MSHA's respirable dust sampling program may not accurately represent atmospheric conditions encountered in the mine. However, if the operator complies with the mandated collection procedures, the result obtained should be reasonably representative of the mine atmosphere. At the hearing there was considerable testimony offered to show that mistreatment and malfunction can affect a sampling device's ability to produce accurate results. The judge recognized this fact, and found that there was no evidence in the record indicating that any of these deficiencies had occurred. 5 FMSHRC at 380. The judge's finding is supported by substantial evidence. In the absence of the necessary showing of actual deficiencies, further consideration of this issue is unwarranted.

In the Mine Act, Congress deferred to the Secretary's expertise and vested him authority to designate approved sampling devices and to determine what constitutes concentrations of respirable dust. 30 U.S.C. 191(a). The Secretary has followed the wording of the Mine Act in his regulations, referring to "respirable dust" and "respirable coal mine dust." See 30 U.S.C. § 842; 30 C.F.R. Part 70. It is argued that the Secretary's use of these terms does not draw a distinction between respirable coal dust and other benign types of respirable dust. Recently, this wording was used because Congress relied on studies conducted on the Mine Research Establishment ("MRE") instrument in establishing the 2.0 mg/m³ respirable dust standard. The MRE device was not designed to differentiate among different dust types and an amalgamated approach is therefore reflected in the 2.0 mg/m³ respirable dust standard. It is also noteworthy that the respirable dust standard addresses any disability from any other occupation-related disease, and that some of the diseases, chronic bronchitis for instance, can be caused by any type of respirable dust.

A similar rationale applies to the argument concerning oversized particles. Some particles larger than 10 microns behave aerodynamically like smaller particles and are subject to collection by the sampling device. Tr. 275-80. This action occurs in the MRE instrument as well as other devices approved by the Secretary. Thus, owing to its genesis, the 2.0 mg/m³ standard reflects a certain number of these oversized particles in that limit.

The Secretary's respirable dust analysis procedures provide for a built-in check for oversized particles when a sample reveals a weight gain greater than 6mg (an MRE equivalent result of 8.6 mg/m³). This

between the weight gain cutoff point and the validity of the sample. Whether this policy always should prevail over an operator's specific request that a suspect sample be inspected visually for oversized particles remains an open question. In this case, however, Consol failed to articulate to MSHA, or later to prove, other sufficient grounds to bring the accuracy of the samples into question.


On the basis of the foregoing, particularly the strength of the Tenth Circuit's decision in AMC v. Marshall, we reject Consol's sampling procedure challenges and conclude that MSHA's general sampling and testing procedures for respirable dust are sufficiently accurate to designate violations of section 70.100(a) as significant and substantial. In addition, an operator is not precluded from proving that the accuracy of the sampling or testing results in a particular instance was compromised thereby defeating the allegation of a violation as well as a significant and substantial finding. Consol presented no persuasive evidence to the contrary in this case.

IV.

Finally, we analyze under the criteria approved earlier in this decision whether Consol's violation of the respirable dust standard was significant and substantial.

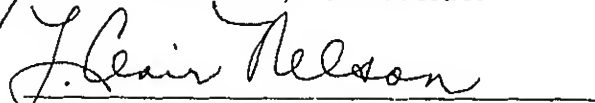
Consol has admitted that it violated section 70.100(a) based on the excessive designated occupation sampling results at issue. Accordingly, a prima facie case that this violation was significant and substantial was established by the Secretary. Consol did not assert or prove that no miners were exposed to the hazard. We note that the record is devoid of any references to the use of personal protective equipment by the miners involved here. Accordingly, the significant and substantial nature of the violation is established.

On the foregoing bases, the judge's decision is affirmed. 8/


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

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ADMINISTRATION (MSHA),
on behalf of DONALD R. HALE

v.

Docket No. VA 85-29-D

4-A COAL COMPANY, INC.

BEFORE: Backley, Doyle, Lastowka, and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), presents the question of whether the administrative law judge properly granted the operator's motion to dismiss the Secretary of Labor's discrimination complaint alleging that Donald R. Hale's discharge by 4-A Coal Company ("4-A") was in violation of the Mine Act. Mr. Hale had filed a timely discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA"), but the Secretary did not file his complaint before the Commission until more than two years later. Respondent 4-A moved to dismiss the Secretary's complaint as untimely. The presiding judge, Commission Administrative Law Judge Joseph B. Kennedy, granted 4-A's motion and dismissed the complaint. 7 FMSHRC 1552 (October 1985) (ALJ). For the reasons that follow, we reverse and remand for further proceedings.

4-A operated the No. 4 Mine, an underground coal mine located in Buchanan County, Virginia. The Secretary's complaint alleges that 4-A discriminated against Hale when it discharged him on June 16, 1983, for making safety complaints to management about the lack of a methane monitor on his scoop. 1/ Five days after his discharge, Hale filed a timely discrimination complaint with MSHA. The Secretary notified 4-A of Hale's complaint and commenced an investigation to determine whether

1/ A scoop is a mechanized vehicle used primarily to transport coal from the face to the dumping point.

On September 3, 1985, in response to the Secretary's complaint, 4-A filed with the Commission an answer and a motion to dismiss the proceeding. As grounds for its motion to dismiss, 4-A contended that the Secretary had failed to file his complaint "immediately" with the Commission pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2), as evidenced by the two-year delay in filing. Counsel for the Secretary did not file a response to 4-A's motion to dismiss. The administrative law judge subsequently granted 4-A's unopposed motion and dismissed the Secretary's complaint. 7 FMSHRC at 1552. The Secretary then filed a motion for reconsideration, which 4-A opposed. The judge had issued a dispositive order in the case and therefore denied the Secretary's motion on both legal and jurisdictional grounds. Order dated October 25, 1985. 2/ The Secretary petitioned the Commission for discretionary review of the judge's order of dismissal, and we directed the case for review.

At the outset we reject the Secretary's argument that the Commission's procedural rules obligated the judge to issue an order to show cause before he dismissed this case. Commission Procedural Rule 63(a) provides:

Generally. When a party fails to comply with an order of a judge or these rules, an order to show cause shall be directed to the party before the entry of any order of default or dismissal.

29 C.F.R. § 2700.63(a) (emphasis added). While Rule 63 addresses the subject of summary disposition of proceedings, it applies only under the specified circumstances. Neither a failure to comply with an order of a judge nor a rule of procedure was involved here. Rather, the Secretary decided not to file a statement in opposition to 4-A's motion to dismiss as permitted by our rules. 29 C.F.R. § 2700.10(b). The judge was under no procedural obligation to issue an order to show cause prior to granting 4-A's motion to dismiss. Cf. 29 C.F.R. § 2700.64(c); Fed. R. Civ. P. 56(e) (if a party does not respond to a summary judgment motion, judgment, if appropriate, may be entered against him).

We also find no merit in the Secretary's argument that the judge's dismissal of the complaint was intended as a sanction for the Secretary's

2/ Commission Procedural Rule 65(c) in part provides, "The jurisdiction of the Judge terminates when his decision has been issued by the Executive Director." 29 C.F.R. § 2700.65(c). Inasmuch as the judge no longer had jurisdiction over the case, his discussion of the merits of the Secretary's motion for reconsideration has no legal effect.

the captioned wrongful discharge case on the grounds it was untimely. Under the Commission Rules, the Secretary had 10 days to respond. The Secretary having failed to respond or otherwise oppose the operator's motion or to seasonably move for an enlargement of time, it is ORDERED that the operator's motion be, and hereby, is GRANTED and the case DISMISSED. See Rules 9, 10, and 41.

7 FMSHRC at 1552. We find nothing in the text of the judge's decision compelling the conclusion that the dismissal was intended as a sanction for the Secretary's failure to respond. Furthermore, the Commission rules cited by the judge are logically relevant to his decision. We also find unpersuasive the Secretary's statement that 4-A's dismissal motion, "given its legal and factual deficiencies, did not appear to warrant a response." Any motion to dismiss a complaint is a serious matter not to be ignored, particularly where, as here, an innocent party is dependent upon the Secretary's prosecution of his claim. We expect that in the future the Secretary will not treat motions to dismiss discrimination complaints so cavalierly.

Turning to the substantive ground advanced in the motion to dismiss, and therefore the ground controlling the judge's dismissal order, 4-A summarily contended that the Secretary failed to file his complaint "immediately" with the Commission pursuant to section 105(c)(2) of the Mine Act, as evidenced by his two-year delay in filing. We find this bare ground, without more, to be legally insufficient to sustain the motion and therefore conclude that the judge erred in granting it.

The Mine Act requires the Secretary to proceed with expedition in investigating and prosecuting a miner's discrimination complaint. The Secretary is required to act within the following time frames: (1) The investigation of a miner's complaint "shall commence within 15 days" of receipt of the miner's complaint (30 U.S.C. § 815(c)(2)); (2) the Secretary "shall notify" the miner, in writing, of his determination as to whether a violation of section 105(c)(1) of the Mine Act has occurred "[w]ithin 90 days" of receipt of the miner's complaint (30 U.S.C. § 815(c)(3)); and (3) if the Secretary determines that there has been a violation of the Act, "he shall immediately file a complaint with the Commission." 30 U.S.C. § 815(c)(2). (Emphasis added throughout.) 3/ Finally, section

3/ The Commission's rules of procedure implement these provisions. Commission Procedural Rule 41(a) addresses the Secretary's obligation under 30 U.S.C. § 815(c)(2) to file his complaint "immediately" with the Commission by requiring that the filing be accomplished within 30 days of the Secretary's written determination that a violation has occurred.

While the language of section 105(c) leaves no doubt that Congress intended these directives to be followed by the Secretary, the pertinent legislative history nevertheless indicates that these time frames are not jurisdictional:

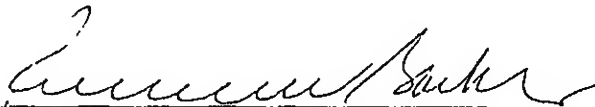
The Secretary must initiate his investigation within 15 days of receipt of the complaint, and immediately file a complaint with the Commission, if he determines that a violation has occurred. The Secretary is also required under section 10[5](c)(3) to notify the complainant within 90 days whether a violation has occurred. It should be emphasized, however, that these time-frames are not intended to be jurisdictional. The failure to meet any of them should not result in the dismissal of the discrimination proceedings; the complainant should not be prejudiced because of the failure of the Government to meet its time obligations.


S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 624 (1978) ("Legis. Hist."). Plainly, Congress clearly intended to protect innocent miners from losing their causes of action because of delay by the Secretary.


Related passages of legislative history make equally clear, however, that Congress was well aware of the due process problems that may be caused by the prosecution of stale claims. See Legis. Hist. at 624 (discussion of 60-day time limit for the filing of miner's discrimination complaint with the Secretary). The fair hearing process envisioned by the Mine Act does not allow us to ignore serious delay by the Secretary in filing a discrimination complaint if such delay prejudicially deprives a respondent of a meaningful opportunity to defend against the claim.

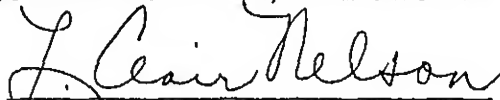
Accordingly, we hold that the Secretary is to make his determination of whether a violation occurred within 90 days of the filing of the miner's complaint and is to file his complaint on the miner's behalf with the Commission "immediately" thereafter -- i.e., within 30 days of his determination that a violation of section 105(c)(1) occurred. If the Secretary's complaint is late-filed, it is subject to dismissal if the operator demonstrates material legal prejudice attributable to the delay. Cf. David Hollis v. Consolidation Coal Co., 6 FMSHRC 21, 23-25 (January 1984), aff'd mem., 750 F.2d 1093 (D.C. Cir. 1984) (table); Walter A. Schulte v. Lizza Industries, Inc., 6 FMSHRC 8, 12, 11-12

Administrative law judge, reinstate the Secretary's complaint and remand the case for further proceedings consistent with this opinion. 5/


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


E. Clair Nelson, Commissioner

We reject the Secretary's contention that because he filed his complaint within 30 days of determining that a violation had occurred, he acted in a timely fashion. This contention ignores the 90-day time frame specified in section 105(c)(3) and the possibly prejudicial effect of the considerable delay involved here.

Chairman Ford did not participate in the consideration or disposition of this matter.

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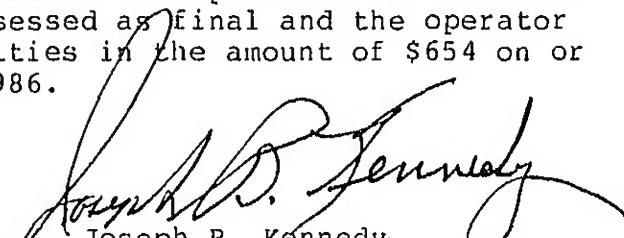
Administrative Law Judge Joseph B. Kennedy
Federal Mine Safety and Health Review Commission
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

ADMINISTRATIVE LAW JUDGE DECISIONS

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 85-82
Petitioner	:	A. C. No. 15-14382-03510
v.	:	
	:	No. 3 Mine
JOLINE, INC.,	:	
Respondent	:	
	:	

ORDER OF DEFAULT

The operator having failed to comply with the Pretrial Order or to respond to the Order to Show Cause of May 6, 1986, it is ORDERED that the operator be, and hereby is, deemed in DEFAULT. It is FURTHER ORDERED that pursuant to Rule 63(b) the proposed penalties are assessed as final and the operator directed to pay said penalties in the amount of \$654 on or before Friday, June 20, 1986.


Joseph B. Kennedy
Administrative Law Judge

Distribution:

Mary Sue Ray, Esq., Office of the Solicitor, U. S. Department of Labor, 280 U. S. Courthouse, 301 Broadway, Nashville, TN 37203 (Certified Mail)

Robert J. Greene, Esq., Box 432, Betsy Layne, KY 41605 (Certified Mail)

dcpc

JUN 3 1986

SECRETARY OF LABOR	:	CIVIL PENTALTY PROCEDURE
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 85-14
Petitioner	:	A. C. No. 15-10904-01
v.	:	
	:	No. 6 Mine
KARST ROBBINS COAL COMPANY,	:	
INC.,	:	
Respondent	:	
	:	

DECISION

Appearances: Charles F. Merz, Esq., Office of the Solicitor
U. S. Department of Labor, Nashville, Tennessee
for Petitioner;
Mr. Edward W. Karst, Operator, Louellton,
Kentucky, for Respondent

Before: Judge Kennedy

These matters came on for a decision after hearing
Hazard, Kentucky, on May 22, 1986. At that time, the proposed
settlement of the two violations charged as follows:

CITATION/ORDER

ACTION/PENALTY

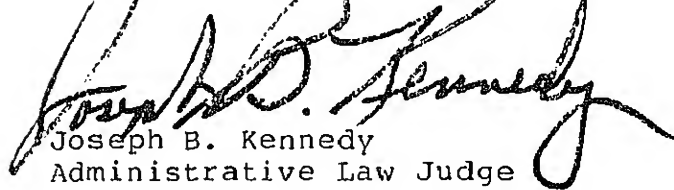
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Vacate

2476391

\$600.00

Based on an independent evaluation and de novo review of
the circumstances, as proffered in the parties' prehearing
submissions and in the evidence adduced at the hearing, the
trial judge found the settlement proposed was in accordance with
the purposes and policy of the Act.



Joseph B. Kennedy
Administrative Law Judge

Distribution:

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Mr. Edward W. Karst, President, Karst Robbins Coal Co., Inc., P. O. Box 493, Louellen, KY 40853 (Certified Mail)

dcp

EMERALD MINES COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. PENN 86-1
	:	Order No. 2536796;
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Emerald Mine No. 1
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
UNITED MINE WORKERS OF	:	
AMERICA (UMWA),	:	
Intervenor	:	

DECISION

Appearances: R. Henry Moore, Esq., Rose, Schmidt, Ch
Duff & Hasley, Pittsburgh, Pennsylvania
Contestant;
James B. Crawford, Esq., Office of the
Solicitor, U.S. Department of Labor, Ar
Virginia, for Respondent;
Tom Shumaker and Larry Steinhoff, Unite
Workers of America, Local 2258, Waynesb
Pennsylvania, for Intervenor.

Before: Judge Melick

This case is before me under section 105(d) of t
Federal Mine Safety and Health Act of 1977, 30 U.S.C.
et. seq., the "Act," to challenge a withdrawal order
to Emerald Mines Company (Emerald) by the Secretary o
under section 104(d)(1) of the Act.^{1/} Hearings held
1986, and this decision were expedited pursuant to Em
request. See Commission Rule 52, 29 C.F.R. § 2700.52

1/ Section 104(d)(1) provides as follows:

"If, upon any inspection of a coal or other min
authorized representative of the Secretary finds that
has been a violation of any mandatory health or safet
standard, and if he also finds that, while the condit
created by such violation do not cause imminent dange
violation is of such nature as could significantly an
stantially contribute to the cause and effect of a co
other mine safety or health hazard, and if he finds s
violation to be caused by an unpreventable failure o

that standard.

The order at bar, No. 2536796, alleges a violation of the mine operator's fan stoppage plan under the regulatory standard at 30 C.F.R. § 75.321²/ and charges as follows:

The fan stoppage plan was not followed on 4/5/86 in that the No. 4 Mine fan was down more than 15 minutes and the persons underground were not removed from the mine. The fan went down approximately 13:51 and restarted approximately 14:18.

As relevant hereto the fan stoppage plan provides that "if the fan is down for more than 15 minutes, all personnel will be withdrawn from the mine in an orderly manner."

During relevant times the Emerald No. 1 Mine was equipped with an alarm system which, when properly functioning, would trigger an alarm on the surface in the computer room and in the lamp room when any of the mine ventilation fans failed to function. It was the established procedure for the lampman to make a written notation of the time such an alarm would sound and to alert responsible mine officials of a fan stoppage and the precise time of stoppage. Prompt corrective action could then be taken and, upon the lapse of the 15 minute time period set forth in the plan, evacuation effected.

On April 6, 1986, however, the No. 4 fan stopped but the alarm system failed to function. Based on computer records it is not disputed that the fan stopped operating at 1:50 and 50 seconds "computer time." There is no computer record of the time the fan resumed operation. The specific issue before me is whether or not that fan resumed operation prior to the expiration of the 15 minute time period set forth in the fan stoppage plan. If it did not then there was a violation of the plan since a timely evacuation of the mine was not made.

²/ The cited standard is construed to require the operator to comply with the fan stoppage plan approved by the Secretary, i.e., the provisions of the plan are enforceable as though they were a mandatory standard. See Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976); Secretary v. Carbon County Coal Co., 7 FMSHRC 1367 (1985).

compared his watch to the computer clock and found his watch to be 7 minutes faster than the computer clock.

In sum the Secretary argues that the fan must have gone off at 1:57 and 50 seconds (i.e. 1:50 and 50 seconds plus the 7 minute correction to Buttermore's watch). Implicit in the Secretary's argument is that Buttermore's testimony that the power (and thus also the fan) went down at 1:59 p.m. was erroneous. According to the Secretary, therefore, the fan was down for 16 minutes and 10 seconds, exceeding the 15 minute time frame set forth in the fan stoppage plan by 1 minute and 10 seconds.

Emerald argues on the other hand that Mr. Buttermore's testimony of his time recordation standing alone is the best evidence of the elapsed time. According to this view the fan was down from 1:59 p.m. to 2:14 p.m., and was within compliance of the 15 minute time frame in the fan stoppage plan. Buttermore's testimony is not however consistent. It is not disputed that the fan went down at 1:50 p.m. and 50 seconds "computer time" and that Buttermore's watch was 7 minutes faster than that. Accordingly Buttermore's estimate that the power went off (and the fan went down) at 1:59 p.m. was clearly erroneous. Since the time recordation was within the complete control of the mine operator the proffered times should also be construed strictly against the operator. Under the circumstances I accept the Secretary's reconstruction of the time interval and find that there was a violation of the fan stoppage plan by 1 minute and 10 seconds.

I cannot however find on the facts of this case that exceeding the 15 minute time period by 1 minute and 10 seconds was a "significant and substantial" violation of the plan. See Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984).

3/ The MSHA Investigators also relied upon markings on the fan charts (Exhibits G-3 and G-4) to conclude that the No. 4 fan had actually been stopped for 30 minutes. Other witnesses examining the same records with a magnifying glass concluded however that the No. 4 fan had been down for less than 15 minutes. From my own examination of those charts with a magnifying glass I am unable to ascertain, with any degree of certainty, the time interval during which the fan was stopped. Under the circumstances I accord but little weight to this evidence.

greatly reduced by this significant factual change. Under the circumstances there is simply insufficient evidence to find that the violation was "significant and substantial."

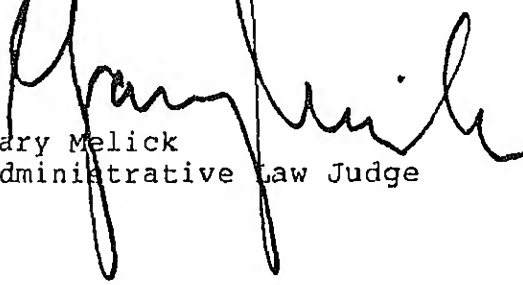
I further find that the violation was not caused by "unwarrantable failure." In Zeigler Coal Company, 7 IBMA 28 (1977). The Interior Board of Mine Operations Appeals interpreted the term "unwarrantable failure" as follows:

An inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of lack of due diligence, or because of indifference or lack of reasonable care.

The Commission has concurred with this definition to the extent that an unwarrantable failure to comply may be proven by a showing that the violative condition or practice was not corrected or remedied prior to the issuance of a citation or order, because of indifference, willful intent, or serious lack of reasonable care. United States Steel Corp., v. Secretary of Labor, 6 FMSHRC 1423 at 1437 (1984).

It is clear in this case that the failure to precisely record the time of the fan stoppage was the result of an unanticipated failure in the alarm system.^{4/} The designated employee, the lampman, was therefore unable to precisely record the time the fan went down. Since this time was, due to this unexpected failure, erroneously recorded and that erroneous information was conveyed to mine management it cannot be said that management knew or even should have known of the violation.

In addition, I find that the manager having what was then the best available information, Charlie Buttermore, determined in good faith that he restarted the subject fan within the 15 minute time frame. Furthermore as soon as higher managers realized that the 15 minute time frame might have been exceeded they promptly evacuated the mine and



Gary Melick
Administrative Law Judge

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5/ Since I have found on the facts of this case that an "unwarrantable failure" did not exist it is not necessary to consider Emerald's objections to such findings on the ground that the findings were based on an "investigation" rather than an "inspection" and that the alleged violation was abated before the order was issued.

rbg

PITTSBURG & MIDWAY
COAL MINING CO.,
Respondent

DECISION

Representatives: James H. Barkley, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
John A. Bachmann, Esq., The Pittsburgh & Midway
Coal Mining Co., Denver, Colorado,
for Respondent.

by: Judge Carlson

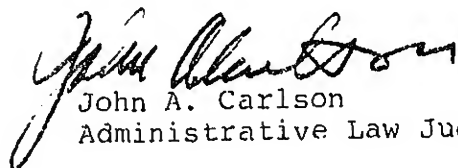
This civil penalty proceeding came regularly on for
hearing at Denver, Colorado on May 16, 1986. The case in-
volved two citations charging that pins in the steering
mechanism of two large coal-hauling trucks were loose. The
Secretary cited this alleged condition as a violation of the
mandatory safety standard published at 30 C.F.R. § 77.404(a)
which requires that mobile equipment be maintained in safe
operating condition.

The Secretary put on his evidence and rested. As
the Respondent proceeded with its evidence it became ever more
evident that witnesses for the two parties were not only
in disagreement about the design characteristics of the
steering mechanisms, but that there were divergent notions
as to which parts of the trucks were actually the subject
of the citations. During a recess this judge suggested to
the parties that they confer with a view to resolving the
discrepancies about which parts were involved. The parties
did so.

When the hearing reconvened, counsel for the Secretary
admitted that there had been a good faith mistake-of-fact
on the part of the enforcement authorities, and that the
Secretary therefore moved to vacate both citations. Counsel
for the Respondent agreed with that disposition, and moved for

highly appropriate and announced his intention to grant

Accordingly, both citations in the case are hereby ORDERED vacated with prejudice, together with the proposed penalties; and respondent's plea for attorney fees and costs is ORDERED withdrawn and stricken. This proceeding is dismissed.


John A. Carlson
Administrative Law Judge

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WHITE COUNTY COAL CORPORATION,;	CONTEST PROCEEDINGS
Contestant	:
v.	:
	Docket No. LAKE 86-58-R
	Order No. 2817373; 2/6/86
SECRETARY OF LABOR,	:
MINE SAFETY AND HEALTH	:
ADMINISTRATION (MSHA),	Docket No. LAKE 86-59-R
Respondent	Order No. 2817375; 2/21/8
	:
	Pattiki Mine

DECISION

Before: Judge Melick

These cases are before me upon the contests filed by the White County Coal Corporation (White County) under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," to challenge the issuance of the Secretary of Labor of two orders of withdrawal under section 104(d) of the Act.^{1/}

^{1/} Order No. 2817373 was issued under section 104(d)(1) of the Act. That section reads as follows:

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act."

Order No. 2817375 was issued under section 104(d)(2) of the Act. That section provides as follows:

"If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1) a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent

section 104(d) orders be issued not based on existing practices or conditions actually perceived during an inspection by an inspector as purportedly required by that section of the Act. The essential underlying facts indeed do not appear to be in dispute and I find that White County is entitled to partial summary decision as a matter of law. Commission Rule 64, supra.

On February 6, 1986, an inspector for the Federal Mine Safety and Health Administration (MSHA), Wolfgang Kaak, was conducting an inspection of the White County Pattiki Mine when he discovered that a chalk centerline had been drawn under the unsupported roof of room No. 6 from the last row of permanent supports inby to the face for a distance of 13 feet. It is clear that the inspector was not present when the chalk line was drawn and that he did not observe anyone under the unsupported roof.

The coal drill operator, Darrell Marshall, admitted to Inspector Kaak however that he had drawn the chalk line in question because the mining sequence was behind schedule and he was being pressed to keep his coal drilling process going. Marshall also admitted that he had walked under the unsupported area even though he had seen the red flag warning of the danger. Based upon these observations and admissions Kaak thereupon issued section 104(d)(1) Withdrawal Order No. 2817373 alleging an unwarrantable violation of the standard at 30 C.F.R. § 75.200. That standard provides in pertinent part that "no person shall proceed beyond the last permanent support"

The order reads as follows:

A chalk centerline was observed on the roof of room No. 6 running from the last row of permanent supports, roof bolts, inby to the face. This area was and had not been supported when the coal drill operator, (D. Marshall), made the centerline on the roof. The distance from the last row of bolts to the face was 13 feet. Working section I.D. 003-0.

The order was terminated 25 minutes later following crew reinstruction on the roof control plan.

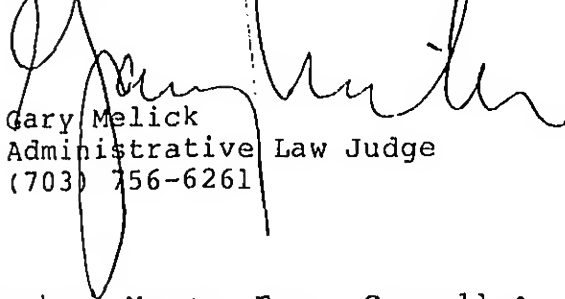
upon questioning the foreman and miners in the area. Kaak nevertheless then issued section 104(d)(2) Order No. 2817375 alleging an unwarrantable violation of 30 C.F.R. § 75.200. The order reads as follows:

Physical evidence, footprints, were observed going through an area of unsupported roof in the X-cut between Entry No. 6 and Entry No. 7 at curve Y spad No. 1773. The opening averaged about 10 feet long by 10 feet wide. The height average was 6 feet. The area was rock dusted and foot prints were clearly visible. Work section I.D. 002-0.

This order was terminated about 1 hour later after the crew was again reinstructed on the roof control plan and the area had been permanently supported.

Citing the decisions of 5 Commission Administrative Law Judges (Westmoreland Coal Company, Docket Nos. WEVA 82-34-R et al, May 4, 1983, Judge Steffey; Emery Mining Corporation, 7 FMSHRC 1908, 1919 (1985), Judge Lasher; Southwestern Portland Cement Company, 7 FMSHRC 2283, 2292 (1985), Judge Morris; Nacco Mining Company, 8 FMSHRC 59 (1986), Chief Judge Merlin, review pending; Emerald Mines Corporation, 8 FMSHRC 324 (1986), Judge Melick, review pending) White County maintains that the section 104(d) orders herein are invalid because they were not issued based upon a finding by an MSHA inspector of an existing violation of the Act or a mandatory standard.

It is not necessary to here restate the supportive rational of the cited decisions. It is sufficient to state that I am in agreement with the rational of those decisions and the principles stated therein that section 104(d) orders cannot be issued based upon a finding by the inspector of a violation that has occurred in the past but no longer then exists. It is undisputed in this case that the inspector did not observe any violations being committed but that he based his issuance of the 104(d) orders before me upon evidence of past violations. Accordingly White County's motion for partial summary decision is granted and the orders at bar are accordingly modified to citations under section 104(a) of the Act.



Gary Melick
Administrative Law Judge
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rbg

BON TRUCKING COMPANY, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. KENT 85-34-R
v.	:	Order No. 2472775; 9/25/84
	:	
SECRETARY OF LABOR,	:	Docket No. KENT 85-35-R
MINE SAFETY AND HEALTH	:	Order No. 2472776; 9/25/84
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. KENT 85-151-R
	:	Citation No. 2595441; 6/6/8
	:	
	:	Docket No. KENT 85-152-R
	:	Citation No. 2594993; 6/6/8
	:	
	:	Docket No. KENT 85-153-R
	:	Citation No. 2594994; 6/6/8
	:	
	:	Docket No. KENT 85-154-R
	:	Citation No. 2594996; 6/6/8
	:	
	:	Docket No. KENT 85-155-R
	:	Citation No. 2594997; 6/6/8
	:	
	:	Berger No. 2 Mine
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 86-104
Petitioner	:	A.C. No. 15-13202-03544
v.	:	
	:	Berger No. 2 Mine
BON TRUCKING COMPANY, INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Melick

These consolidated cases are before me under section 105(d) of the Federal Mine Safety and Health Act of 1977 the "Act." Proceedings had been stayed in these cases at the specific request of the mine operator and the Secretary to await the decision of the United States Attorney as to whether to present criminal charges. Because of the age of these cases and the lack of specific information as to when t

"These citations and orders were issued during the investigation of the multiple fatal roof fall September 12, 1984 at the Berger No. 2 mine operated by Bon Trucking Company, Incorporated (Bon Trucking). They are specially assessed penalties totalling \$55,000.00. Bon Trucking has offered to settle the matters by the voluntary penalty payment of \$50,000 to be allocated by the Secretary amounting [sic] the various violations. The Secretary has agreed, at request of Bon Trucking counsel, to accept payment of the agreed amount in five monthly installments, the first of which is to be \$10,000 due on the last day of the month in which the administrative law judge approves the settlement, with the remainder being paid \$10,000 per month for the following four months on the last day of each month. It is also understood that the total balance will be due together with interest and costs as provided by the Federal Mine Safety and Health Act of 1977 (Mine Act) and federal debt collection laws if Bon Trucking fails to make these installment payments as agreed.

The Secretary submits that the following allocation of the settlement is consistent with the remedial purposes of the Mine Act in particular Section 110(i), and is in the public interest:

<u>Citation/Order No.</u>	<u>30 C.F.R.</u>	<u>Proposed</u>	<u>Settlement</u>
2272775	75.200	\$10,000	\$10,000
2472776	75.200	\$10,000	\$10,000
2594994	75.200	\$10,000	\$10,000
2594996	75.201	\$10,000	\$10,000
2594993	75.200	\$ 5,000	\$ 5,000
2594995	75.200	\$ 3,000	\$ 1,000
2594997	75.303	\$ 5,000	\$ 2,000
2594998	75.1200	\$ 2,000	\$ 2,000
TOTAL		\$55,000	\$50,000

The roof fall collapsed on six miners, killing four and injuring two, as indicated in the Secretary's investigation report. The massive roof fall occurred in the second set of entries off 1st right of the Berger No. 2 Mine, Harlan County, Kentucky. The fall occurred while the miners were working in the

cross-cut widths exceeded the allowable widths as required by the roof control plan and that mining of pillars (second mining) inby the accident area had occurred.

The Secretary's allocation of penalties appropriately places the maximum penalty on those four violations which were the greatest contributing factors in the roof fall. This allocation properly requires full payment of the maximum civil penalty proposed for these four roof-control and mining method violations. In these violations, Bon Trucking was cited for not following the major provisions of its approved roof-control plan and for practicing mining methods which resulted in faulty pillar recovery. In a fifth violation, a \$5,000 penalty is assessed for the violation citing Bon Trucking for mining pillars (second mining) when it did not include procedures for such activity or supporting the roof during second mining in the roof control plan submitted for MSHA's approval.

Failure to provide supplementary roof support materials and failure to conduct a pre-shift examination are violations cited which the Secretary also has included in this settlement. These violations, in the Secretary's view, contributed to a substantially lesser degree to the cause of the roof fall but were issued during the investigation and are discussed in the Secretary's report. This lesser and indirect relationship to the accident supports the reduction of these proposals as indicated. The penalty proposal for the up-dated mine map violation remains unchanged, since maps provided by the operator at the time of the roof fall bore very slight resemblance, to the actual mining structure and conditions underground. A higher penalty was not proposed for this clear violation since, it too, was not directly related to the cause of the roof fall. The settlement amounts are consistent with what the Secretary would expect had the cases been litigated.

All the violations in these proceedings were very serious.

The Secretary maintains that these violations

takes the position that for purposes of actions other than actions or proceedings under the Mine Act, nothing contained herein shall be deemed an admission by Bon Trucking that it violated the Mine Act or its standards. Therefore, the issue of Bon Trucking's negligence is in dispute between the parties.

The violations were abated in good faith and the operator's history of prior violations is not considered a factor in their occurrence. The operator is medium in size and the payment of these penalties will not adversely effect its ability to remain in business. (However, the operator is not presently engaged in active operation of a mine.)

This settlement agreement is the complete written agreement between the Secretary and Bon Trucking. While the Secretary agrees that this settlement is not an adjudication of the issues herein in dispute, it is understood by Bon Trucking that these citations and orders are final dispositions under the Mine Act and will be considered a part of Bon Trucking's history for purposes of the Mine Act."

Based on the representations and documentation submitted in these cases I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act and is consistent with this Commissions decision in Secretary v. Amax Lead Company of Missouri, 4 FMSHRC 975 (1982).

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Bon Trucking Co., Inc., pay penalty of \$50,000 in accordance with the payment schedule provided in the settlement agreement. The Contest proceedings are dismissed.



Gary Melick
Administrative Law Judge

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J

SECRETARY OF LABOR, : Docket No. WEST 86-36-R
MINE SAFETY AND HEALTH : Order No. 2503819; 10/22/85
ADMINISTRATION (MSHA), :
Respondent : Deer Creek Mine

DECISION

Appearances: Timothy Biddle, Esq., and Peter K. Levine, Esq.,
Crowell & Moring, Washington, D.C.,
for Contestant;
James H. Barkley, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Respondent.

Before: Judge Morris

These consolidated cases, heard under the provisions of the
Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et
seq., (the Act), arose from a regular inspection of contestant
Deer Creek coal mine on October 22, 1985. On that date a federal
mine inspector issued citations under section 104(d)(1) of the
Act.

Emery contests the citations and denies that a violation
occurred; further, Emery asserts that if a violation occurred
was not caused by Emery's unwarrantable failure to comply with
the regulation.

The cases were expedited and heard in Salt Lake City, Utah,
on March 5, 1986. Emery submitted two Commission decisions in
support of its position. The Secretary did not submit any post-
hearing submissions.

General Background

The parties stipulated that Emery is subject to the Act. The
administrative law judge has jurisdiction over the dispute.
The citation and order attached to the notices of contest are
authentic copies of the ones served on Emery. Further, the
inspector was a duly authorized representative of the Secretary
of Labor when the citation and order were issued. Finally, the
citation and order at issue were properly served on Emery (Tr
6).

and [sic] sagging between the roofbolts, several steel roof matts have buckled and several roofbolts have pulled through the bearing plates, the chain link has loaded up with broken top between the matts causing it to sage [sic] on to the trolley gard [sic] compressing it against the energized trolley, loaded trips of material have rubed [sic] against the top tearing the chain link at two locations.

The cited regulation provides as follows:

§ 75.200 Roof control programs and plans.

[STATUTORY PROVISIONS]

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

Summary of the Evidence MSHA's Evidence

MSHA inspector Dick Courtney Jones, a person experienced in mining, issued a citation and order in the First South switch a of the Emery Deer Creek Mine on October 22, 1985 (Tr.

The coal seam underneath the entry was also being. As a result there was a lot of caving and settling in (Tr. 26). A portion of the roof was also secured with fencing (Tr. 35).

The inspector indicated (referring to an area shown exhibit P1) that some of the roof bolts had failed and fractured coal was causing the chain link to sag. Four roof bolts had failed. Also pressure on the bolts had six by six metal plates over the head of the bolts (Tr. 34). Such bolts are no longer effective when the roof presses the plates over the end of the bolts (Tr. 34, 35). This is an uncommon occurrence and it indicates "real pressure area (Tr. 39).

During an inspection the roof and rib areas are always checked. In a location where the top had been secured with chain link fencing the coal had sagged down to a point where the chain link was pressing across the trolley (Tr. 35). One of the trolley guards had already worn through. The clearance between the trolley wire should be six to eight inches (Tr. 35, 36). The trolley wire carries 250 to 300 volts of DC power. If contact occurs between the energized trolley and the chain link, resulting sparking and heat could cause a serious and possibly fire in a short time (Tr. 37, 38, 44). In the inspector's opinion about 65 feet of roof in this area had deteriorated (Tr. 43).

The inspector considered this to be an S & S violation because the company should have known of the condition because of the travel through the area (Tr. 50, 51). They could have known of the condition of the trolley wire as well as the failed bolts (Tr. 51, 52). The loss of bearing plates indicated the bolts were no longer sustaining their weight. The leaning timbers also confirmed this view. It would take at least a few weeks or possibly months before a bearing plate becomes separated from the bolt. There are always physical signs before a plate fails. In the area there was no indication of the plates that had been forced over bolts (Tr. 40-42, 56). This particular area was not subject to a preshift examination (Tr. 52). The preshift examiner should have checked for any such problems (Tr. 53). The inspector found that no entry had been made concerning this condition in the preshift and onshift examinations book (Tr. 54).

In abating the violation extensive work was required to support the roof. This also indicated to the inspector that it took a month for the condition to develop (Tr. 44).

chain link fence and the roof (Tr. 224).

Witness Tucker confirmed inspector Jones' testimony about statement to Christensen (Tr. 226).

If the trolley wears through the guarding and comes in contact with the chain link fence, a fire could result. Also there was a possibility of chain link fence striking the miner as he was riding through the area. Fire and roof fall hazards existed in this area of bad top (Tr. 90, 91). The fracturing of the roof and its settlement onto the chain link took one or two days to occur (Tr. 92-93).

In Tucker's opinion this condition was apparent and should have been known to management on the day of the inspection. In addition, in Tucker's view, the condition existed for a week or more before the inspection (Tr. 101). But he had no scientific background to support his opinion (Tr. 111).

Emery's Evidence

Kenneth D. Calihan, Emery's shift foreman, oversees the production of coal and is responsible for safety at the Deer Creek coal mine (Tr. 140-142).

The First South track haulage runs from No. 1 crosscut to approximately No. 120 crosscut. The area of roof discussed by the inspector was approximately from 58 crosscut to 80 crosscut (Tr. 143). At the time of the inspection, between crosscut 62 and 68, there was a row of cribs installed on five-foot centers the full length of the area. The mining activities created a condition known as a squeeze or a roll (Tr. 143, 144). The cribs on one side and timber on the other in the 65-66 crosscut were provided additional roof support (Tr. 144-146). It was not possible to place timber and cribs any closer (Tr. 147). The roof was cited by the inspector, between crosscuts 65 and 66, was developed with 6 foot conventional roof bolts. At various times the bottom and top were cut and the area was matted (Tr. 145). The mats had some bulges in it from catching the fractured top between the gaps in the mats (Tr. 150).

Calihan returned to the area with Inspector Jones and Max Tucker (Tr. 151). The bulging in the chain link did not indicate a serious long term problem (Tr. 152). Calihan described how

The Emery safety department, as well as its safety committee, monitors this area. Calihan had not had any reports about problems in the area in the year before the issuance of citation (Tr. 147). Three fire bosses, who are certified inspectors and part of the union work force, walk the area each shift (Tr. 148, 149). Calihan could not recall any reports of problems in this area (Tr. 149).

When Calihan was called to 65-66 crosscut he saw that the trolley wire was close to chain link mesh in spots (Tr. 152). The condition was not obvious (Tr. 153). The wear on the wire might have been caused by clearance in the area (Tr. 154).

In this area some roof bolts had been bent and some missing plates (Tr. 156). Calihan agreed that it takes force for bearing plates to pop off (Tr. 181, 186). The ones missing plates were above the wire mesh. They looked old. Conventional roof bolts can be distinguished by their steel material (Tr. 156). In Calihan's opinion the roof was adequately supported (Tr. 156, 157) however, he would change his opinion (that the roof was adequately supported) if it was the loss of bolts that were losing its bearing plates (Tr. 187). The inspector and Calihan only discussed the wire mesh, the guard and the roof bolts (Tr. 157). They shook some coal from the wire mesh. There was still a good layer of trolley wire there were ample roof bolts in place (Tr. 157).

Gary W. Christensen, Emery's safety engineer, testified that he had traveled through the 20-foot wide entry for over a year (Tr. 188, 189). The entry had been mined to a width of 20 feet (Tr. 190).

Emery has been aware of the movement in the area and matted the roof and installed additional roof bolts. On 11/22 Christensen was instructed to check the area for material pushing against the chain link (Tr. 192). Christensen cut the chain, dumped out the coal and rewired the chain link (Tr. 194, 212, 220). As he dumped out the coal the inspector was at the surrounding top. Jones pointed out to the witness that the bolts had pulled through some of the bearing plates. The plate was still on the top side of the chain link. Christensen could not see any newer bolts that had been popped off (Tr. 194). Christensen felt that the new bolts that had been installed provided adequate support in the area (Tr. 215). The men discussed that the chain link was down against the trolley wire (Tr. 196). Jones indicated he wanted immediate action to

I credit MSHA's evidence in resolving the credibility conflicts in this case.

During the inspecting of this entry Inspector Jones observed that four roof bolts had "popped" their plates. This indicated extreme pressure in the area. In addition, there is persuasive evidence that the condition existed for at least a week, probably longer. This evidence arises from the inspector's opinion. It is further supported by the absence of any of the popped plates lying in the area, as well as from the imprint on the chain link fencing caused by the plates. In short, the most recently installed roof bolt plates were the ones that failed.

Emery's evidence counters the inspector's view: the operator's witness felt the bulging in the chain link fencing presented no long term problem. I agree, the bulging in the chain link was not pivotal to the violative condition. It merely served to focus attention on this portion of the entry.

Emery's witnesses further claim the roof, although a problem area, was adequately supported by the three different sets of roof bolts installed with mats on different occasions. Some plates were on the top side of the chain link.

I credit Inspector Jones' contrary evidence and expertise in this case. Jones has been a coal mine inspector for eleven years prior to becoming an inspector he had fifteen years' experience as an underground miner including section foreman in the Deer Creek mine. He also served as a fire boss (Tr. 15-18). At the time of the inspection he was particularly checking the roof and rib areas. Witness Tucker further supports the testimony of Inspector Jones.

While Emery's witnesses were experienced in underground mining I do not consider their expertise to be as persuasive.

In support of its position, Emery relies on the Commission decision in Westmoreland Coal Company, 7 FMSHRC 1338 (1985) and United States Steel Corporation, 6 FMSHRC 1423 (1984). These cases are offered in support of Emery's argument that there was no violation and, in any event, no unwarrantable failure. Emery argues (Tr. 229-230) that it had taken substantial steps to control the roof in this area. Further, the problem of the loose

Witness Calihan agrees that the bearing plates took awhile "pop" off (Tr. 181, 186). Finally, the evidence fails to indicate the presence of any of the popped plates in the area.

The cases relied on by Emery are not factually controlling. Here, the roof bolts had shed their plates at least a week before the citation. Emery's inspectors should have detected this condition. No action was taken. In Westmoreland the Commission held there was no "unwarrantable failure" because "each and every miner who observed the formation before it fell, including the foreman, attempted to bar it down ..." 7 FMSHRC at 1342. In that case at bar an unstable roof was permitted to exist in a trackway for at least a week, probably longer. Emery should have known of this condition.

The Commission decision in United States Steel Corporation does not support Emery. To restate the holding in the case at bar: Emery's failure to correct this defective roof for a week constituted an unwarrantable failure on its part as that term is defined by the Commission.

For the reasons herein stated the contest of Citation 2503818 should be dismissed.

WEST 86-36-R

In this case Emery contests Order No. 2503819. MSHA's allegations Emery violated 30 C.F.R. § 75.200, the same regulation allegedly violated in the companion case.

The order reads as follows:

A large loose rib is present along the First South track at the 3rd West switch. This rib is approximately six feet high and 25 feet long and has separated from the top and main coal seam. The rib is being supported by steel rib bolts and steel mats however the weight of the rib has caused several bolts to break pull through the bearing plates and mats. Haulage equipment regularly park along this area while switch out with equipment traveling to the 3rd West area of the mine.

Summary of the Evidence MSHA's Evidence

subtle settling (Tr. 60).

The inspector was concerned that the rib would come off and anyone adjacent to it would be crushed (Tr. 60). He has the authority to close an area but he did not do so (Tr. 76). After the rib was taken down, Emery installed seven cribs, side to side (Tr. 61).

Most of the working section, 200 to 300 men, would use the route (Tr. 62, 63). Between 10 and 15 locomotive man trips per shift would stop approximately four feet from the rib (Tr. 63-64). Frequently men stand near the rib stretching their legs or sitting in the man trips (Tr. 65).

The rib would have come off if this condition had not been corrected. A fatality could have occurred (Tr. 69). This obvious condition had been deteriorating over a period of months (Tr. 69).

This rib should have been examined by a preshift examiner (Tr. 70).

MSHA's witness Tucker also stated that the rib bolted 4 to 5 feet from the rib was fractured at the top (Tr. 94). One bolt was hanging loose; this left one bolt to hold most of it (Tr. 95). The rib was undercut about three feet (Tr. 95). On the side of the pillar, where the telephone was located, there were two to three-inch wide cracks running the length of the rib (Tr. 95, 96). The fracture had existed for some time (Tr. 97).

Management should have known about the rib because it was obvious and it should have been known to Emery. In addition, miners would also comment about it (Tr. 97-98, 101, 103).

About a year before the MSHA inspection a union inspection team recommended to the mine foreman that the rib be checked (Tr. 98-101). In the close out conference following the union inspection Emery said some additional support had been placed in the rib (Tr. 100).

Emery's Evidence

Emery's witness Kenneth Calihan indicated he travels the Third West Switch area where this order was issued (Tr. 157).

roof (Tr. 159). The purpose of the pinning and matting is to hold the rib in place (Tr. 160). If you take it down and widen the area you would have to add cribs or timber later (Tr. 160). It was observed by almost anyone passing by the area (Tr. 161). Fire bosses also walk by this area (Tr. 161). But the mine foreman had not received any reports of problems with this area (Tr. 161, 162).

Calihan didn't think it was necessary to take the rib down nor was it evident to him that the back was fracturing (Tr. 164). The rib was taken down, but Calihan felt this was more dangerous than to leave it up because the worker pulling it down would be in danger (Tr. 165).

Calihan considers that undercutting was deliberately done by digging but he agreed there were several one to two foot voids without foundation under the rib (Tr. 165-167). Calihan could see a crack in the rib at the roof but he did not know its depth (Tr. 168). He further observed one loose roof bolt (Tr. 170).

Emery's witness, Gary Christensen, indicated that the Third West Switch area is about 1500 feet from the 65-66 crosscut (Tr. 188, 197). Christensen called his supervisor, Calihan, from this area (Tr. 197). Inspector Jones, who was present, brought the condition of the rib to Christensen's attention (Tr. 198). Jones said it wasn't adequately supported and Christensen could see that it had pulled away from the rib at the top. The rib was batted, pinned and cross matted (Tr. 199). The mat had pulled away from the top pin (Tr. 200). He didn't see any cracks in the rib (Tr. 201-206).

The rib is approximately 15 feet from the switch intersection and about the same distance to the telephone booth (Tr. 202).

There was no indication of any recent movement of the rib (Tr. 203).

Discussion

I credit MSHA's evidence in resolving the credibility conflicts in this case.

Inspector Jones described the conditions related in the summary of the evidence. Emery's evidence takes a lesser view of the seriousness of the problem. But Emery's witnesses basically

from the top.

Discussion

The obvious physical condition of the rib was essentially agreed to by all witnesses. These conditions cause me to conclude that the rib at this switch area was unstable and not adequately supported. For these reasons I concur in MSHA's position that a violation occurred.

Emery argues that it had taken substantial measures to secure the rib with bolts and mats. Further, it had been stable and solid for over a two-year period (Tr. 229-230). I disagree. The unstable condition described by the inspector and witness Tucker had clearly existed for a long period of time. This was not a "judgment call" as contended by Emery. About a year before the MSHA inspection, witness Tucker's safety committee recommended to the mine foreman that the rib be checked.

The contest of Order No. 2503819 should be dismissed.

Conclusions of Law

Based on the record and the factual findings made in the narrative portion of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.
2. Contestant failed to meet its burden of proof in WEST 86-35-R and WEST 86-36-R.
3. Contestant's conduct constituted an unwarrantable failure to comply with the regulation.
4. The contests filed herein should be dismissed.

ORDER

Based on the foregoing facts and conclusions of law, I enter the following order:

1. The contest filed in WEST 86-35-R is dismissed.
2. The contest filed in WEST 86-36-R is dismissed.

James H. Haggerty, Deputy Commissioner, Division of Labor, 1585 Federal Building, 1961 Stout Street, Denver, 80294 (Certified Mail)

/blc

JUN 11 1986

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 85-307
Petitioner	:	A.C. No. 36-02404-03595
v.	:	
	:	Greenwich No. 2 Mine
GREENWICH COLLIERIES,	:	
Respondent	:	

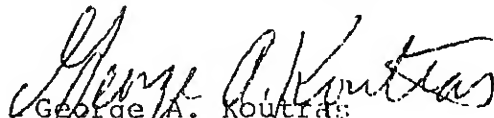
ORDER OF DISMISSAL

Before: Judge Koutras

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the responder pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The petitioner proposed a civil penalty assessment in the amount of \$1,000 for an alleged violation of mandatory safety standard 30 C.F.R. § 75.316, as stated in section 104(d)(2) Order No. 2407481 April 18, 1986.

This case was docketed for hearing with seven other cases in Indiana, Pennsylvania, during the hearing term June 3, 1986. When the case was called for trial, petitioner's counsel confirmed that the contested order has been vacated. Counsel moved that the civil penalty proposal be withdrawn, and that the case be dismissed. In support of the motion, counsel asserted that the inspector relied on an incorrect standard that the cited "condition or practice" does not constitute a violation of the respondent's approved ventilation plan.

After due consideration of the petitioner's oral motion to dismiss, IT IS GRANTED, and this case IS DISMISSED.


George A. Koutras
Administrative Law Judge

Joseph T. Kosek, Esq., Greenwich Collieries, P.O. Box 367
Ebensburg, PA 15931 (Certified Mail)

/fb

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 86-51
Petitioner : A.C. No. 36-02404-03608
v. :
GREENWICH COLLIERIES, : Greenwich Collieries No. 2
Respondent :
GREENWICH COLLIERIES, : CONTEST PROCEEDINGS
Contestant :
v. : Docket No. PENN 86-7-R
: Order No. 2549436; 9/3/85
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Docket No. PENN 86-8-R
ADMINISTRATION (MSHA), : Order No. 2549437; 9/3/85
Respondent :
: Docket No. PENN 85-314-R
: Order No. 2549335; 8/30/85
: Greenwich No. 2 Mine

DECISION AND ORDER OF DISMISSAL

Appearances: Linda M. Henry, Esq., Office of the Solicitor
U.S. Department of Labor, Philadelphia,
Pennsylvania, for the Petitioner/Respondent;
Joseph T. Kosek, Esq., Greenwich Collieries,
Ebensburg, Pennsylvania, for the Respondent/
Contestant.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings were scheduled for hearing in Indiana, Pennsylvania, during the hearing term June 3-5, 1986, along with several other cases involving these same parties. Docket No. PENN 86-51, is a civil penalty proceeding.

Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. MSHA seeks civil penalty assessments for five alleged violations of certain mandatory safety standards found in Part 101, Title 30, Code of Federal Regulations, as charged in five section 104(d)(2) orders, with special "S&S" findings, issued on the respondent Greenwich Collieries in August and September 1985. Docket Nos. PENN 85-314-R, PENN 86-7-R and PENN 86-10-R are three contests filed by Greenwich Collieries challenging the legality of three of the orders (2548335, 2549436, and 2549437).

Discussion

The conditions or practices cited as alleged violations in these proceedings are as follows:

Order No. 2549419 - August 22, 1985, 30 C.F.R. § 75.516-2(c). Additional insulation was not provided for the communication circuit (twist wires) where they crossed over and under power cables in the track entry leading to the M3 tailgate of the M5 longwall working section. This telephone wire was twisted around 550 volt pump cables at the distribution box at the M3 #2 crossbelt. This box was placed in this area on 8-21-85 and the telephone wire should have been seen. This telephone wire also crossed 550 volt pump cables in the track entry and certified persons should have seen this condition.

Order No. 2549335 - August 30, 1985, 30 C.F.R. § 75.400. An accumulation of combustible material consisting of paper, rags, and cardboard boxes was allowed to exist in the first crosscut inby the M-2 track switch, within 8-1/2 feet of the energized trolley wire 250 volts D/C power. The cardboard boxes measured with a standard rule 1-1/2 x 2 foot in width, 3 foot in length. There were 8 of them with fiberglass insulation in them. There were also several smaller cardboard boxes filled with paper and rags in this area. This area was preshifted on the 4 to 12 p.m. shift at 10:00 hours, R.B. on the 8/29/85.

and contained a cutter along the left rib of which 4" to 6" of rock fell out. The roof supports in this area, posts and bolts, showed sign of pressure on them. This area is examined each shift during the preshift examination.

Order No. 2549437 - September 3, 1985, 30 C.F.R. § 75.303(a). An adequate preshift examination was not conducted in the M-14 area of the mine in that an obvious violation and hazardous condition existed along the M-14 track entry and this condition had not been reported or recorded in the book provided for this purpose on the surface. This area was preshifted on the 12:01 a.m. to 8 a.m. shift on 9/3/85 by Donald Schroyer. It was apparent that this condition existed for a period of time.

Order No. 2404348 - September 16, 1985, 30 C.F.R. § 75.400. An accumulation of combustible materials (lunch wrappers and wax paper) were thrown on the mine bottom in the last open crosscut off of the L-1 entry in the M-5 longwall section ID No. 004. The crosscut is used for the men eating dinner.

When these dockets were called for trial, the parties advised me that they had reached a settlement of all of the contested violations, and pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, they jointly moved for approval of the proposed settlement. The parties were afforded an opportunity to present their proposals on the record, and the proposed settlement disposition is as follows:

<u>Order No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement</u>
2549419	8/22/85	75.516-2(c)	\$ 500	\$ 100
2549335	8/30/85	75.400	800	400
2549436	9/3/85	75.202	1,000	1,000
2549437	9/3/85	75.303(a)	1,000	1,000
2404348	9/16/85	75.400	500	250

removed from the mine, but were cited by the inspector before this could be done. Under the circumstances, counsel suggest that the degree of negligence is not as high as originally believed, and that the proposed settlement of \$400 for the violation is not unreasonable.

With regard to Order No. 2404348, petitioner's counsel pointed out that the cited accumulations consisted of paper materials discarded by the miners immediately after eating their dinner on the shift prior to the inspection. Counsel believes that the proposed settlement of \$250 is reasonable under the circumstances.

With regard to Order No. 2549419, petitioner's counsel asserted that the gravity was low and that it was unlikely that the cited condition would result in an accident or injury. Under the circumstances, counsel believed that the agreed upon settlement of \$100 is reasonable.

The parties agreed that the respondent is a medium to large size mine operator employing 700 miners at all of its operations, and that its annual coal production was approximately two million tons. They also agreed that the annual production for the No. 2 Mine is approximately 877,000 tons, and that the payment of the civil penalties in question will not adversely affect the respondent's ability to continue in business.

The parties agreed that all of the violations were abated in good faith within the times fixed by the inspectors. Petitioner's counsel confirmed that the respondent's history of prior violations consists of 245 paid assessments for the first 9 months of 1985, 214 in 1984, and 155 in 1983.

Conclusion

After careful review and consideration of the pleadings, and arguments made in support of the joint oral motion to approve the proposed settlement disposition of this case, I

The respondent IS ORDERED to pay civil penalties in the settlement amounts shown above within thirty (30) days of the date of this decision. Upon receipt of payment by MSHA this matter is dismissed.

In view of the settlement disposition of the civil penalty case, including the disputed orders in question which were contested, Contest Docket Nos. PENN 85-314-R, PENN 86-7-R, and PENN 86-8-R, ARE DISMISSED.


George M. Koutras
Administrative Law Judge

Distribution:

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Joseph T. Kosek, Esq., Greenwich Collieries, P.O. Box 367, Bensburg, PA 15931 (Certified Mail)

b

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 86-56
Petitioner	:	A.C. No. 33-00968-03629
v.	:	
YOUGHIOGHENY AND OHIO COAL	:	Docket No. LAKE 86-57
COMPANY,	:	A.C. No. 33-00968-03630
Respondent	:	Helms No. 2 Mine
	:	
YOUGHIOGHENY & OHIO COAL	:	CONTEST PROCEEDINGS
COMPANY,	:	
Contestant	:	Docket No. LAKE 86-20-R
v.	:	Order No. 2823802; 10/17/85
	:	
SECRETARY OF LABOR,	:	Docket No. LAKE 86-21-R
MINE SAFETY AND HEALTH	:	Order No. 2823806; 10/28/85
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. LAKE 86-30-R
	:	Order No. 2823831; 11/19/85
	:	
	:	Helms No. 2 Mine

DECISION

Appearances: Patrick M. Zohn, Esq., Office of the Solicitor,
U.S. Department of Labor, Cleveland, Ohio for
the Secretary of Labor;
Robert C. Kota, Esq., St. Clairsville, Ohio for
Youghiogheny & Ohio Coal Company.

Before: Judge Melick

These consolidated cases are before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act," to challenge citations and withdrawal orders issued by the Secretary of Labor to the Youghiogheny & Ohio Coal Company (Y&O).

The roof control plan was again not complied with in the 3 section of main East at the following locations: (1) "A" Entry - the one row of temporary roof supports were installed 60 inches, 67 inches, 70 inches and 62 inches from the face and another row of temporary roof supports was required to be installed in this area prior to installing the last row of bolts in this entry at that time. (2) "D" Entry - the last temporary roof supports in the second row of supports which was in the right side of the entry was [sic] 90 inches from the right rib leaving unsupported roof 78 inches from the first row temporary roof support on the right side of the entry to the face (78 inches X 90 inch area) and requiring another temporary roof support prior to bolting. (3) D - E crosscut - in the second row of temporary row of roof support, one was 20 inches from the other, width wise, and the last support on the right side was 96 inches from the right rib leaving unsupported roof 22 inches from the first

Section 104(d)(1) of the Act reads as follows:

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering such area until an authorized representative of the Secretary determines that such violation has been abated."

in the order nor that these facts constitute violations of its roof control plan page 57 (Appendix A).^{2/} It argues only that the violations were not "significant and substantial" and were not caused by its "unwarrantable failure" to comply with the roof control plan.

A violation is "significant and substantial" if (1) there is an underlying violation of a mandatory safety standard, (2) there is a discrete safety hazard, (3) there is a reasonable likelihood that the hazard contributed to will result in injury, and (4) there is a reasonable likelihood that the injury in question will be of a reasonably serious nature. Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).

In this regard MSHA coal mine inspector Franklin Homko testified that there had been 17 roof falls during 1985 at the Nelms No. 2 Mine and that two of those roof falls had occurred in the No. 3 section at issue. Based on this history and the noted deviations from the requirements of the roof control plan Homko opined that it was reasonably likely that a partial or complete roof fall could occur in the area cited. He further opined that should a roof fall occur it was reasonably likely that miners working beneath the roof would receive serious or fatal injuries.

Assistant Y&O safety director Lawrence Wehr acknowledged that the right side of the crosscut between the D and E Entries and the D Entry itself were not adequately supported and in fact were "dangerous". Under the circumstances I find that the violation was "significant and substantial" and serious.

Unwarrantable failure is defined as the failure by an operator to abate a condition that he knew or should have known existed, or the failure to abate because of indifference or lack of due diligence or reasonable care. Ziegler Coal Corp., 7 IBMA 280 (1977); United States Steel Corp., 6 FMSHRC 1423 (1984). In this regard it is not disputed that Inspector Homko had, only 3 days before the issuance of the

^{2/} Y&O understandably did not object to the multiplicity of charges set forth in the orders before me (16 separate violations charged in the two orders). To the extent that such multiple charges prevent separate "significant and substantial" and "unwarrantable failure" findings for each violation

In addition Homko observed that the cited violative conditions had not been reported in the required on-shift and pre-shift reports from October 27, 1985, at 12 p.m. through the time he issued the order at bar on October 28. It is not disputed that the cited area was subject to pre-shift and on-shift examinations to be performed by state certified persons such as a section foreman or fire boss and that any defects in roof control must be documented in these reports. Homko also observed that notation cards placed in the section and initialed and dated by the certified inspectors showed that the inspections had been performed after 4:00 pm on the 27th of October. The failure of these certified inspectors to have discovered and reported these violative conditions that from their nature should have been fairly obvious, lead me to also conclude that the operator should have known of the cited violations.

Under the circumstances I find that the violation was caused by the "unwarrantable failure" of the operator to comply with the standard. Based on the same evidence I find that the mine operator was negligent. Even though some of the certified inspectors who failed to detect the violation may have been union employees they were clearly acting as agents of the operator while performing these pre-shift and on-shift inspections. The negligence is in any case therefore attributable to the operator.

Withdrawal Order No. 2823831, issued under section 104(d)(1) of the Act, footnote 1 supra, alleges 8 other violations of the operator's roof control plan under 30 C.F.R. § 75.200 and charges as follows:

The roof control plan was not complied with in the following rooms off "E" Entry of 5 section: (1) 71 room - the last cut in this room had a cut taken on the straight and then cut to the left and right of the room for the width of the miner leaving an area of more than 20 feet wide inby the last row of bolts (Fan type cut at face). This type of side cutting is not supported on either side before work is done in or inby this area similar to an inter-section but not mined to create one. (2) 72 room - same condition or practice as in No. 71 room, but the right cut holed into unsupported roof fan cut from the No. 71 room. There was only one post and a danger board installed outby the cut. (3) 73

post and danger board installed in the room. The Secretary, section foreman, supervised mining of the No. 73 room and J. Marshall, section formen, mined the the No. 71 and 72 room.

The Secretary contends that the order charges 8 violations of the plan, namely: (1) in room 71 the cut taken to the left off the last straight cut; (2) in room 71 the cut taken to the right off the last straight cut; (3) in room 71 in referring to the "same condition or practice as in No. 72 room" the order refers to the cut taken to the left off the last straight cut; (4) in room 72 the cut taken to the left off the last straight cut; (5) the right side cut in the 72 room was cut so that it holed into the 71 room into unsupported roof created by the left side cut taken in the 72 room; (6) in the 72 room only one post and a danger board were installed outby the cut; (7) in room 73 the cut taken to the left off the last straight cut; and (8) in the 73 room only one post and a danger board were installed outby the cut.

It is undisputed that the cited cuts were taken in the manner depicted on Exhibit GX-8 (Appendix B). Y&O acknowledges that it did not have a sufficient number of posts with a danger sign in rooms 72 and 73 but maintains that it did have the requisite danger sign posted and that therefore this admitted violation constituted a mere technicality and not a "significant and substantial" violation. Y&O denies the other alleged violations of the roof control plan.

The Secretary first alleges that the cut taken to the left (violation No. 1) and the cut taken to the right (violation No. 2) in room 71 violated provisions 16 and 19 on pages 55 and 56 of the roof control plan and also violated the foot room width requirements set forth on page 51 of the roof control plan. Provision 19 on page 56 of the roof control plan as clarified at hearing by agreement of the parties (Transcript 220-224) provides that "the last projected cut in room or crosscuts not to be used as travelways need not be supported if the entrance to such areas are [sic] posted with one row of supports installed on a maximum of five foot centers and 'DANGER' signs placed." The Secretary argues in its post hearing brief that since the provision for the "last projected cut" is expressed in the singular, only one cut is permitted and that the side cuts to the right and left to the left were therefore in excess of the one allowed by provision 19.

either temporary or permanent supports before any work is done in or inby the intersection.

Y&O maintains that it complied with provision No. 16 because the continuous miner operator was under supported roof when the sidecuts were made and no other work was to be done in c inby since mining had been completed in that area. Y&O also points out that the sidecuts were in fact begun in areas that were permanently supported as required by provision 16 and as evidenced by roof bolts shown in the diagrams in evidence.

The Secretary next maintains that if the operator intends to take a side cut it must support the roof not only in accordance with provision 16 but also in accordance with the instructions and diagram found on page 57 (Appendix A). Y&O counters however by pointing out that the diagram on page 57 is applicable only to advancing sections and is not applicable under the specific exceptions set forth in provision 1 on page 56 of the plan.

The Secretary argues, finally, that there was nevertheless a violation of the plan because Y&O exceeded the maximum room width allowance of 20 feet set forth on page 51 of the roof control plan. Y&O maintains on the other hand that the cited fan cuts were equivalent to crosscuts and accordingly the corresponding room size in those locations must necessarily exceed the 20 foot maximum width otherwise required by the roof control plan.

Upon my own independent examination of the provisions of the roof control plan I find that the interpretations placed upon it by Y&O are the more rational and convincing. Accordingly the number 1, 2, 3, 4, and 7 violations have not been proven as charged.

The Secretary maintains that alleged violation No. 5 i.e., the right sidecut in the 72 room was cut so that it holed into the 71 room into unsupported roof created by the left side cut taken in the 71 room, was in violation of provision 15(a) on page 55 of the roof control plan. That provision requires that "mine openings will not be cut through to areas that are not totally supported by either temporary supports on maximum of five (5) foot centers or permanent supports installed on pattern as required by the approved plan.

charged. According to the undisputed testimony of Inspector Homko the greatest hazard of room falls was presented by holed through area because it exposed a much larger area unsupported roof. This testimony is not disputed and accordingly I find that the violation was "significant and substantial." Mathies Coal Company, supra.

I also find that this violation was caused by the "unwarrantable failure" of the operator to comply with the roof control plan. Indeed the operator's excuses that it was necessary to hole through to provide ventilation and that he did not intend to mine any additional coal after holing through provides no defense or justification for the clear violation. There are no exceptions for the requirements of provision 15(a) and the operator clearly should have known of the violation. Indeed it is not disputed that two section foremen were actually cutting the side cuts in the manner cited. The violation was thus caused by the "unwarrantable failure" of the operator to comply with the cited provisions of the roof control plan and was the result of a high degree of negligence. Ziegler Coal Corp., supra, United States Steel Corp, supra.

Inasmuch as Y&O has admitted to the number 6 and 8 violations in that it has conceded that it did not have the roof supports installed on a maximum of 5 foot centers and that "DANGER" signs placed thereon in the No. 72 and 73 rooms, those violations are proven as charged. It is conceded however that these "supports" are not designed for actual roof support but are intended only to warn persons from entering a dangerous area. It is also acknowledged that in this case one support had been placed at the center of the entrance to each of the rooms and that "danger" signs were hung on the supports warning persons not to enter the rooms. Under the circumstances I do not find that the violation was "significant and substantial" Mathies Coal Company, supra. Since the placement of the danger signs was also in substantial compliance with the requirements of the roof control plan, I do not find that the violation was caused by the "unwarrantable failure" of the mine operator to comply with the plan.

Since at least one of the eight cited violations (violation No. 5) has been proven as charged with attendant "significant and substantial" and "unwarrantable failure" findings, section 104(d)(1) order No. 2823821 is affirmed.

Accordingly I find that a penalty of \$800 is appropriate for the violations found in Order No. 2823806 and a penalty of \$500 for the violations found in Order No. 28238031.

At hearing the parties agreed to settle the remaining citations at issue i.e., Citation Nos. 2023802 and 2825317. Y&O agreed to pay the penalty of \$147 initially proposed by the Secretary for the former citation and agreed to pay \$25 (a reduction of \$60) for the violation charged in latter citation. I have considered the documentation and representations presented in support of the settlement and find that the proposal is appropriate under the criteria set forth in section 110(i) of the Act.

ORDER

The Youghiogheny and Ohio Coal Company is hereby ordered to pay civil penalties of \$1,472 within 30 days of the date of this decision. Contest Proceedings Docket Nos. LAKE 86-2 and LAKE 86-21-R are dismissed. Contest Proceeding Docket N LAKE 86-30-R is granted in part and denied in part in accordance with the decision herein.



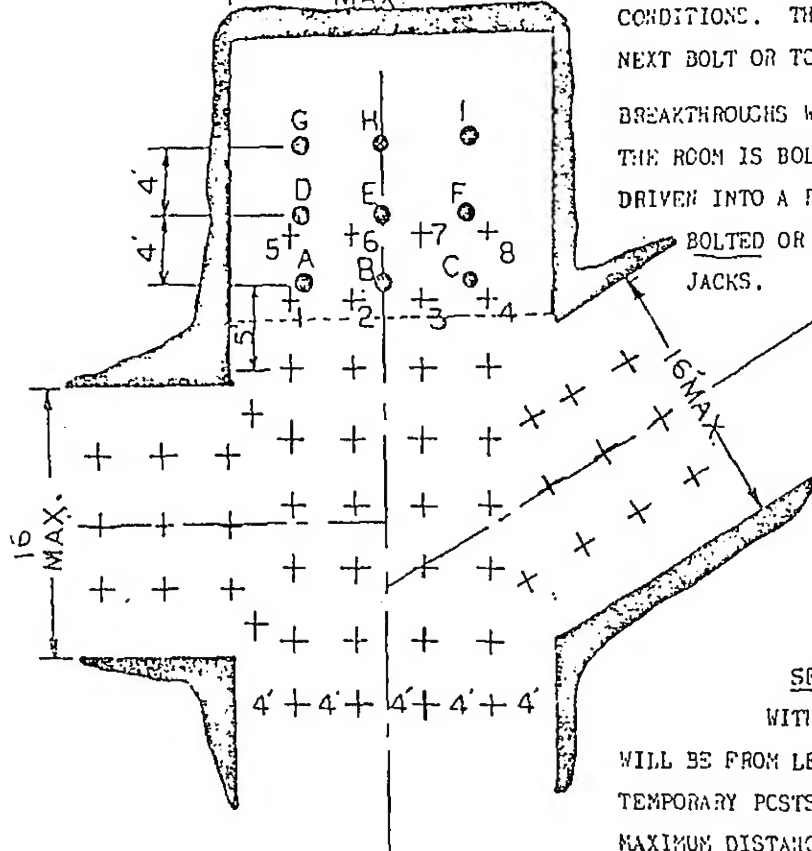
Gary Mellick
Administrative Law Judge

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Robert C. Kota, Esq., Youghiogheny & Ohio Coal Company, P.O. Box 1000, St. Clairsville, OH 43950 (Certified Mail)

rbg



CONDITIONS. THE DISTANCE FROM ONE BOLT TO THE NEXT BOLT OR TO THE RIB WILL NEVER EXCEED 4 FEET. BREAKTHROUGHS WILL NOT BE TURNED OFF UNTIL THE ROOM IS BOLTED, NOR WILL BREAKTHROUGHS BE DRIVEN INTO A ROOM UNTIL THE ROOM IS BOLTED OR SUPPORTED WITH TEMPORARY JACKS.

SEQUENCE OF BOLTING

WITH SINGLE BOOM BOLTERS

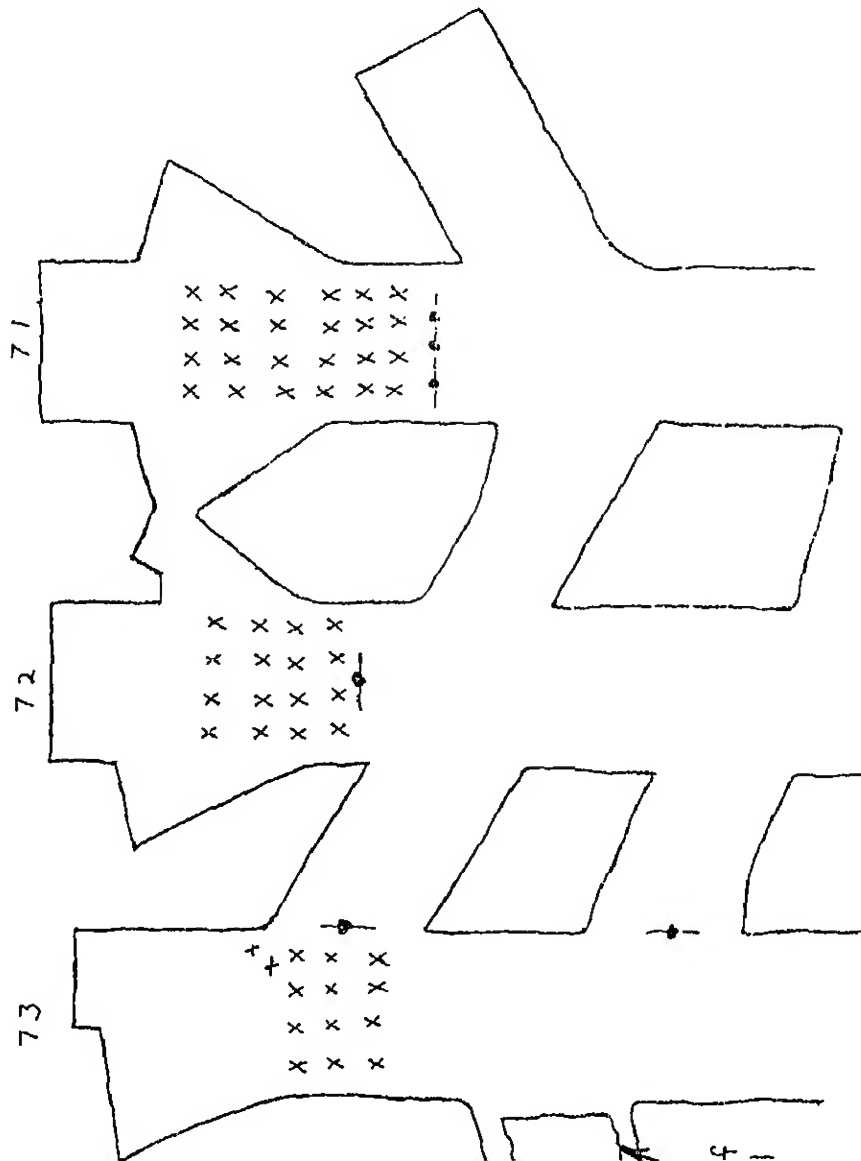
WILL BE FROM LEFT TO RIGHT AS FOLLOWS: 1. INSTALL TEMPORARY PCSTS OR JACKS A, B, C, D, E, AND F. 2. MAXIMUM DISTANCE FROM BOLTS, RIB OR CHAINAGE SHALL NOT EXCEED 4 FEET. 3. INSTALL ROOF BOLTS 1, 2, 3, AND 4. (4 FEET MAXIMUM DISTANCE FROM LAST ROW OF BOLTS, 4 FEET MAXIMUM DISTANCE FROM BOLTS AND NOT OVER 4 FEET FROM RIB). 4. MOVE BOLTERS A, B, AND C TO LOCATIONS G, H, AND I, AND BOLTERS D, E, AND F TO LOCATIONS J, K, AND L. 5. INSTALL BOLTS 5, 6, 7, AND 8. 6. CONTINUE MOVING BOLTERS TO NEW LOCATIONS AND INSTALLING BOLTS. 7. BOLTS ARE INSTALLED TO WITHIN 4 FEET

DRIVING DISTANCE

THE LENGTH OF CONTINUOUS MINER ADVANCE SHALL BE LIMITED TO A DISTANCE OF 16 FEET. BOLTING WILL BE LIMITED TO A DISTANCE OF 16 FEET. KEEP THE MINER OPERATOR UNDER THE LAST ROW OF BOLTS.

X - Noo
-9- - Pos
All other
Supports
Require

GX-8



30+89

RONALD E. MCKINNEY, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. WEVA 86-92-D
: MSHA Case No. HOPE CD 8
EASTERN ASSOCIATED COAL :
CORPORATION, : Keystone No. 2 Mine
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

This is a discrimination proceeding initiated by the complainant Ronald E. McKinney against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, alleging that the respondent discriminated against him by discharging him for exercising certain rights afforded him under the Act. Mr. McKinney's initial complaint was investigated by MSHA, and it declined to file a formal complaint with this Commission. Mr. McKinney subsequently retained private counsel who filed this action on his behalf.

This matter was scheduled for a hearing on the merits at Beckley, West Virginia, on June 19, 1986. By motion filed June 5, 1986, Mr. McKinney's counsel requested leave to withdraw the complaint on the ground that the parties have resolved their differences and have settled the matter. The terms of the settlement agreement are set forth in a four-page agreement executed by Mr. McKinney and counsel for the parties, and they all agree that the settlement terms are fair and proper.

The respondent has agreed to make a lump sum payment to Mr. McKinney in complete satisfaction of all claims against the respondent, and to change its employment termination records from a discharge of McKinney to reflect a voluntary resignation. The respondent also agrees that upon receipt of any future job reference requests on Mr. McKinney's behalf,


ety and attendance ratings of "satisfactory," and information reflecting that he is not eligible for rehire due to his voluntary resignation.

Conclusion

After careful review and consideration of the settlement terms and conditions executed by the parties in this proceeding, including Mr. McKinney, I conclude and find that it reflects a reasonable resolution of his complaint. Since it seems clear to me that all parties are in accord with the agreed upon settlement disposition of the complaint, I see no reason why it should not be approved.

ORDER

The proposed settlement IS APPROVED. Respondent IS ORDERED AND DIRECTED to fully comply forthwith with the terms of the agreement. Upon full and complete compliance with the terms of the agreement, this matter is dismissed.


George A. Koutras
Administrative Law Judge

Distribution:

Thryn R. Bayless, Esq., Bayless & Wills, 1625 North Walker Street, Princeton, WV 24740 (Certified Mail)

ly S. Rock, Esq., Eastern Associated Coal Corporation, PPG Place, Pittsburgh, PA 15222 (Certified Mail)

QUARTO MINING COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. LAKE 85-72
v.	:	Citation No. 2330910
	:	
SECRETARY OF LABOR,	:	Powhatan No. 4 Mine
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 85-9
Petitioner	:	A.C. No. 33-01157-03
	:	
v.	:	Powhatan No. 4 Mine
	:	
QUARTO MINING COMPANY,	:	
Respondent	:	

DECISION

Appearances: Timothy M. Biddle, Esq., and Thomas C. Mea Crowell & Moring, Washington, D.C. for Contestant Quarto Mining Company (Quarto); Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Respondent/Petitioner Secretary of Labor (Secretary)

Before: Judge Broderick

STATEMENT OF THE CASE

This is a consolidated contest and civil penalty proceeding in which Quarto challenges the validity of a citation and violation of 30 C.F.R. § 75.1106-2, and the Secretary of Labor has assessed a civil penalty for the alleged violation. The parties have submitted the case on stipulated facts, including joint affidavits. Following submission of the stipulation, Quarto filed a Motion for Summary Decision and the Secretary filed a Cross Motion for Summary Decision. Both parties have submitted legal briefs. The parties accept the stipulation of facts as constituting the facts of the case.

Based on the stipulation, I find the following facts:

Quarto is the operator of an underground coal mine in Monroe County, Ohio, known as the Powhatan No. 4 Mine. It produces coal which enters and affects interstate commerce. Quarto is a large operator and has an average history of prior violations. It has had no previous violations of the standard involved in these proceedings. Payment of a civil penalty for the alleged violation will not adversely affect Quarto's ability to continue in business.

On April 6, 1985, as it had done previously, Quarto placed a heavy-duty metal acetylene cylinder and an oxygen gas cylinder on a longwall chain conveyor to be moved along the conveyor trough toward the headgate of the longwall. The cylinders were placed in the confines of a metal chain haul conveyor flight, resting on the chains. They were not placed in any special devices designed to hold the cylinders in place during transit. As the acetylene cylinder travelled along the trough of the chain conveyor, it caught against a piece of metal protruding from one of the sides of the stationary trough. The cylinder ruptured causing an explosion. Seven miners suffered first, second, and/or third degree burns to the upper body and were taken to a hospital.

MSHA officials conducted an investigation of the accident on Saturday, April 6, 1985. A citation was issued at 3:40 p.m. on Monday, April 8 alleging a violation of 30 C.F.R. § 75.1106-2(a)(1). Issuance of the citation was delayed in part because of MSHA's uncertainty whether the standard applied to longwall chain conveyors. MSHA had not previously issued a citation or order to any operator applying the standard to longwall chain conveyors, and no policy memoranda or other interpretive document had been issued stating that the standard applied to longwall chain conveyors.

A chain conveyor, such as was on the longwall here, moves material by mechanically pushing it across a stationary surface in the trough. The material is pushed through the trough by a series of regularly placed flights attached to the moving chain. In moving coal after it is cut from the face, the chain conveyor clears the cut coal and deposits it on a belt conveyor by a stationary loader at the end of the chain conveyor. A belt conveyor, as distinguished from a chain conveyor, provides a moving surface (the belt) on which material is placed and transported.

involved here was issued, Quarto demonstrated good faith in abating the alleged violation within the time set for abatement

REGULATION

30 C.F.R. § 75.1106-2(a)(1) provides as follows:

(a) Liquified and nonliquified compressed gas cylinders transported into or through an underground coal mine shall be:

(1) placed securely in devices designed to hold the cylinder in place during transit on self-propelled equipment or belt conveyors;

ISSUES

1. Does the mandatory standard apply only to the transportation of compressed gas cylinders on self-propelled equipment or belt conveyors?

2. Do the facts establish that the longwall chain conveyor was self-propelled equipment?

3. Do the facts establish that the longwall chain conveyor was a belt conveyor?

4. If a violation of the mandatory standard is established, what is the appropriate penalty?

CONCLUSIONS OF LAW

JURISDICTION

Quarto was subject to the provisions of the Federal Mine Safety and Health Act of 1977 (the Act) in the operation of the Powhatan No. 4 Mine, and I have jurisdiction over the parties and subject matter of this proceeding.

INTERPRETATION OF REGULATIONS

The Secretary argues that the Act and the regulations promulgated under it should be liberally construed to promote their purpose in preserving life and health. Quarto concedes

promote its purpose, but denies that the rule of liberal construction applies to the Secretary's regulations. It is clear, and Quarto does not contend otherwise, that broadly-phrased standards are necessary, and are to be tested whether they inform a reasonably prudent person that the condition or conduct involved was prohibited by the standard. Secretary v. Mathies Coal Company, 5 FMSHRC 300 (1983); Secretary v. Alabama By-Products Corp., 4 FMSHRC 2128 (1982). The basic rule of interpretation of a mandatory standard, however, is "the plain language of the regulation. Absent a clearly expressed legislative or regulatory intent to the contrary, that language ordinarily is conclusive." Secretary v. Freeman United Coal Mining Company, 6 FMSHRC 1577 (1984). As an aid in interpreting the language of a regulation, it should be read "in the context of the preventive purpose of the statute." See Secretary v. United States Steel Corporation, 5 FMSHRC 3, 5 (1983). When the violation of a regulation results in the imposition of a penalty, however, the rule of liberal construction must give way to the requirement that the regulation give fair notice of the prohibited conduct. Diamond Roofing Co. v. OSHRC, 528 F.2d 64 (5th Cir. 1976); Phelps Dodge Corp. v. FMSHRC, 681 F.2d 1189 (5th Cir. 1982); Gates & Fox Company v. OSHRC, No. 80-1446 (D.C. Cir. May 13, 1986). Therefore, I look first to the language of the regulation involved here to determine whether it fairly gives notice that the conduct complained of is prohibited by the regulation.

BREADTH OF THE REGULATION

The mandatory standard in issue here attempts to regulate the transportation of compressed gas cylinders: It requires that they be disconnected from hoses and gages; that they be labeled "empty" when the gas has been expended; that they may not be transported on mantrips; and, (1) during transit on self-propelled equipment or belt conveyors, that they be placed securely in devices designed to hold them in place, (2) during transit by trolley wire haulage, that they be placed in well insulated and substantially constructed containers specifically designed for holding them.

Because the standard specifically refers to certain modes of transportation: self-propelled equipment, belt conveyors, trolley haulage, mantrips, I conclude that other forms of transportation (assuming there are any) of gas cylinders are not regulated by the standard.

basis for the citation was the transportation of cylinders on a conveyor, and the Secretary is precluded from now changing the basis of the citation. It also argues that the chain conveyor is not self-propelled equipment. Addressing the latter issue is clear to me, and I conclude, that a longwall chain conveyor is not self-propelled equipment. Part 75 of the regulations (standards in underground coal mines) uses the term self-propelled in referring to self-propelled electric face equipment such as cutting machines, shuttle cars, battery powered machines, roof drills and bolters (75.523), in referring to a self-propelled mantrip car (75.1100-2(d)), in requiring that operators face in the direction of travel (75.1403-10-(j)) that self-propelled rubber tired haulage equipment have a brakes, lights and a warning device (75.1403-10(e)), in requiring cabs and canopies for self-propelled electric face equipment (75.1710-1). The term self-propelled equipment thus refers to equipment which has its own source of power, which moves from place to place, and which (ordinarily at least) has an operator. A conveyor is not such a piece of equipment.

CHAIN CONVEYOR-BELT CONVEYOR

The terms chain conveyor and belt conveyor are not defined in the Secretary's regulations. They are defined in the Dictionary of Mining, Mineral and Related Terms (United States Department of the Interior, 1968) as follows:

Chain conveyor; scraper chain conveyor. A conveyor comprising one or two endless linked chains with crossbars or flights at intervals to move the coal or mineral. The loaded side of the conveyor runs in a metal trough while the empty side returns along guide underneath. The material is transported on the conveyor partly by riding on the chains and flights and partly by being scraped along in the trough. . .

Belt conveyor. A moving endless belt that rides on drums and on which coal or other materials can be carried for various distances. The principal parts of a belt conveyor are (1) a belt to carry the load and transmit the pull, (2) a driving unit, (3) a supporting structure and idler between the terminal drums, and (4) accessories. . .

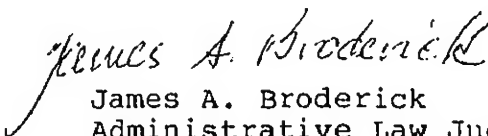
These definitions are consistent with the stipulations and 11) submitted in this proceeding, and very clearly ar

ngwall chain conveyor." (Stipulation 25). Obviously, therefore, in promulgating the regulation involved here, the Secretary did not intend to treat chain conveyors as the same as equivalent to belt conveyors.

The Secretary argues that it was clearly hazardous to move a compressed gas cylinder by mechanically pushing it along a chain conveyor. And indeed it was hazardous, and caused multiple injuries. It may be that transportation of such cylinders on chain conveyors should be banned. But that is not the issue before me. Rather the issue is whether such transportation comes within the regulation cited, that is, whether the regulation fairly notifies the operator that it encompasses transportation on chain conveyor. I conclude that it does not. Therefore, I conclude that the mandatory standard in 30 C.F.R. § 1106-2(a)(1) does not apply to the transportation of compressed gas cylinders on longwall chain conveyors. The citation contested here was therefore invalidly issued.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED that citation 2330910 issued to Quarto on April 8, 1985 is VACATED. IT IS FURTHER ORDERED that the petition for assessment of civil penalty is DENIED.


James A. Broderick
Administrative Law Judge

Distribution:

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Solicitor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified
mail)

k

CHANEY CREEK COAL CORPORATION,	Respondent	:	No. 3 Mine
		:	
SECRETARY OF LABOR,		:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH		:	
ADMINISTRATION (MSHA),		:	Docket No. KENT 86-51-D
ON BEHALF OF		:	MSHA Case No. BARB CD 85-48
ODELL MAGGARD,		:	
	Complainant	:	No. 3 Mine
v.		:	
		:	
DOLLAR BRANCH COAL		:	
CORPORATION,		:	
and		:	
CHANEY CREEK COAL CORPORATION,		:	
	Respondents	:	

DECISION

Appearances: Tony Oppegard, Esq., Appalachian Research & Defense Fund of Kentucky, Inc., Hazard, Kentucky, for Odell Maggard; Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor; Thomas W. Miller, Esq., Miller, Griffin & Marks, P.S.C., Lexington, Kentucky, for Respondents.

Before: Judge Melick

By decision dated May 8, 1986, the Chaney Creek Coal Corporation was found to have discharged Odell Maggard in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act."^{1/} Based upon that decision the parties subsequently stipulated

^{1/} Following Maggard's refusal to perform what was found to be hazardous work, he was denied alternate work and told to perform the hazardous task "or else." Maggard's subsequent departure from the mine and failure to return was, under the circumstances, a constructive discharge.

extention in filing the Complainant's brief). The total back pay award is therefore \$33,660.19.

The Complainant also seeks an award of attorney's fees and expenses totalling \$18,016.22. This request is based upon a claim of 213.4 hours of legal work at \$80 per hour plus expenses of \$944.22. Section 105(c)(3) of the Act provides that "[w]henever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation."

Respondents object to any attorney's fees arguing that the work performed by the Appalachian Research and Defense Fund of Kentucky, Inc., (Defense Fund) was "totally unnecessary." They suggest that the Complainant would have been "more than sufficiently represented by the Secretary "since the Secretary had also brought action against the Respondents under section 105(c)(2) of the Act and argue that the retention of a private attorney under the circumstances was "totally unreasonable."

While the fees of a true "intervenor" in cases where the government has a statutory obligation to prosecute may be reduced as duplicative (See e.g. Donnel v. United States, 682 F.2d 240 (D.C. Cir. 1982) cert. denied, 103 S.Ct. 1190 (1983); and Rollison v. Local 879, 677 F.2d 741, 748 (9th Cir. 1982)) the fees awarded in Maggard's 105(c)(3) proceeding, which was parallel in many respects to the Secretary's case but independent of it, should not be reduced. Maggard was not an "intervenor" in these consolidated proceedings and his counsel took the lead role in their prosecution. Under the circumstances I find that attorney fees may properly be awarded to counsel for the Complainant. Such fees were "reasonably incurred by the miner" within the meaning of section 105(c)(3).

In addition the record shows that the Secretary did not even decide to bring his section 105(c)(2) case on behalf of Mr. Maggard and actually did not file his complaint with this Commission until December 26, 1985, nearly 2 months after the notice of hearing had been issued in Maggard's section 105(c)(3) case and only 20 days before the hearings commenced

had Maggard's counsel not taken the prosecutive initiative. The Secretary has also on occasion changed his mind about bringing section 105(c)(2) cases thereafter leaving the miner with no representation. Thus there is always uncertainty as to whether the Secretary will actually follow through on any such decision.

The recognized method of computing the amount of attorney's fees begins by multiplying a reasonable hourly rate by the number of hours reasonably expended. Hensley v. Eckerhart, 103 S.Ct. 1933 (1983); Blum v. Stenson, 104 S.Ct. 1541 (1984); Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980). The resulting figure is called the lodestar. The lodestar fee may then be adjusted to reflect a variety of other factors.

Respondents do not object to the proposed hourly rate of \$80. They do object however to what they maintain was time devoted to unrelated activities involving communications with the Secretary and litigating issues surrounding the Secretary's motion to dismiss Maggard's section 105(c)(3) case. Respondents argue that these matters had nothing to do with the anti-discrimination purposes of the Act and did not concern any activities of Respondent. I do not agree. Consultation with the Secretary's counsel and the litigation of issues surrounding the Secretary's motion to dismiss are not unforeseeable consequences of a discriminatory action under the Act. See 2 Court Awarded Attorney Fees ¶ 16.02(a) Those matters were, moreover, clearly "in connection with the institution and prosecution of" proceedings within the context of section 105(c)(3).

Respondents also maintain that the 44-1/2 hours spent preparing and writing the post-hearing brief was "totally excessive, particularly where there were no unique or complicated legal issues and where the attorney is well versed in the area of the law." Counsel for Respondents indicates that he spent, in comparison, "only 15 hours on all aspects of the brief, research and drafting."

The appropriate measure of an attorney's time for setting his fees is of course not the actual time spent but the time that should reasonably have been spent. Spray-Rite Service Corporation v. Monsanto Co., 684 F.2d 1226 (7th Cir. 1982), Copeland v. Marshall, supra. In this regard I observe that the transcript of the proceedings consisted of only 414

nature strictly to the monetary results achieved. Copeland, supra at page 888; Munsey v. Smitty Baker Coal Company, Inc., et al., 5 FMSHRC 2085 (1983). Indeed it is well recognized that market value fee awards in cases such as this take into account the need to assure that miners with bona fide claims of discrimination are able to find capable lawyers to represent them. Moreover the success in cases such as this represents a vindication of societal interests incorporated in the mine safety legislation above and beyond the particular individual rights in the case. Under the circumstances the fee award in this case is not in the nature of an inappropriate "windfall."

Respondents argue, finally, that the Defense Fund should have used paralegals or investigators at a lower billing rate for much of the work. The time an attorney spends on investigating facts is however clearly compensable. 2 Court Awarded Attorney Fees ¶ 16.02(b). In any event there is no evidence this case concerning the availability of paralegals and/or investigators.

Under all the circumstances I find that a reduction in the amount of time reasonably expended of 19-1/2 hours is appropriate. There is no dispute concerning the related expenses of \$944.22 and accordingly the total amount of \$16,456.22 is awarded as attorney fees.

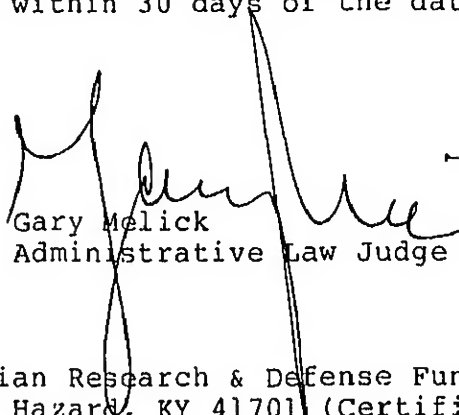
Wherefore Respondents are hereby ordered jointly and severally, to pay to Odell Maggard within 30 days of this decision damages of \$33,660.19 and attorney's fees of \$16,456.22.

CIVIL PENALTY

Based upon information available when the initial decision in this case was rendered a civil penalty of \$1,000 was deemed appropriate. At subsequent proceedings on the issues of damages and costs, however, it was represented that the Complainant, contrary to that decision, had not been reinstated. In addition, as of May 29, 1986, the date the Complainant's computation of interest was filed, it appears that the Complainant had still not been reinstated.

Accordingly the violation of section 105(c)(1) is continuing and has not been abated. I am therefore directing that, in addition to the \$1,000 civil penalty previously

January 10, 1985, up to a maximum of \$9,000. Such additional civil penalties shall be incurred commencing on the first day after the receipt of this decision by counsel for Respondents are accordingly directed to pay, jointly and severally, a civil penalty of \$1,000 and such additional penalties as specified herein within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge

Distribution:

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rbg

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 86-24
Petitioner	:	A.C. No. 01-00323-03557
v.	:	
	:	Chetopa Mine
DRUMMOND COMPANY, INC.,	:	
AS SUCCESSOR BY MERGER TO	:	
ALABAMA BY-PRODUCTS	:	
CORPORATION,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) seeking a civil penalty assessment in the amount of \$700, for an alleged violation of mandatory safety standard 30 C.F.R. § 75.200, as stated in a section 104(d)(2) Order No. 2603334, served on the respondent by an MSHA inspector on July 30, 1985.

The respondent filed a timely answer and contest, and the case was scheduled for hearing in Birmingham, Alabama, on July 16, 1986. However, the parties have now filed a motion pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, seeking approval of a settlement of the case. The respondent agrees to pay a civil penalty in the settlement amount of \$500, and upon approval, withdraws its request for a hearing in this case.

Discussion

The respondent received the order in question as a result of a continuous miner being operated in violation of the roof-control plan. Specifically, the distance from the machine controls to the bits of the ripperhead was 20 feet while the coal had been cut to a depth of 22 feet in by the last row of


petitioner's counsel asserts that the respondent's employer has a progressive disciplinary program for instances of employee misconduct, and that it was implemented in this case. Counsel states that the continuous miner operator received a written reprimand for violating the roof-control plan. Under the circumstances, counsel argues that the respondent's negligence should be considered as slightly moderate, and that in view of all of the available evidence, the parties agree that the proposed settlement disposition of this case is proper and in the public interest.

Conclusion

After careful review and consideration of the pleadings and arguments made in support of the motion to approve the proposed settlement disposition of this case, I conclude and find that it is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. § 2700.30, the motion IS GRANTED, and the settlement IS APPROVED.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of \$500 to the petitioner within thirty (30) days of the date of this decision. Upon receipt of payment, this matter is dismissed.


George N. Koutras
Administrative Law Judge

Distribution:

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George D. Palmer and William Lawson, Esqs., Office of the Solicitor, U.S. Department of Labor, 2015 Second Avenue North, Suite 201, Birmingham, AL 35203 (Certified Mail)

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. ME 85-1-M
Petitioner : A.C. No. 01-02168-05505
v. :
POILLARD SAND COMPANY, : Poillard Sand and Gravel Mine
Respondent :

DEFAULT DECISION

By: Judge Koutras

Statement of the Case

This case concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). Petitioner seeks a civil penalty assessment in the amount of \$500 for an alleged violation of mandatory safety standard 30 C.F.R. § 56.9-3, as cited in a section 104(a) "S&S" Citation No. 2244731, served on the respondent by an MSHA inspector on June 28, 1986.


The respondent filed a timely answer contesting the alleged violation, and the case was scheduled for hearing in Birmingham, Alabama, on July 16, 1986. Due to the absence of the hearing notice, the respondent's owner and operator Ronnie Poillard advised me by letter received May 9, 1987, that he is out of business and no longer in operation, that all of his business assets have been disbursed to pay business obligations. Mr. Poillard further advised that he has no intent to attend the scheduled hearing because "I am no longer in business and have no connection with any corporation under your jurisdiction."

In view of the respondent's position in this matter, I issued an Order to Show Cause on May 23, 1987, requiring the respondent to state why the respondent should not be declared in

The respondent has been given an ample opportunity to refute and defend the alleged violation and proposed civil penalty filed by the petitioner. It seems obvious to me that respondent does not wish to litigate this matter further because he is out of business, and he has failed to respond to my show cause order. Under the circumstances, I conclude and find that the respondent is in default, and that a summary order pursuant to 29 C.F.R. § 2700.63, is appropriate under the circumstances of this case.

ORDER

Judgment by default is entered in favor of the petitioner and I assess the proposed civil penalty assessment of \$500 for the violation in question as the final assessment in this matter. The respondent IS ORDERED to pay the final civil penalty assessment of \$500, to the petitioner within thirty (30) days of the date of this decision and order. The scheduled hearing is cancelled.


George A. Koutras
Administrative Law Judge

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Pollard Sand Company, Route 2, Box 361-C, Gadsden, AL 35203 (Certified Mail)

Mr. Ronnie Pollard, Dixie Concrete Company, 111 North Harris Avenue, Piedmont, AL 35272 (Certified Mail)

/fb

YOUGHIOGHENY AND OHIO COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	Docket No. LAKE 86-4-R
	:	Order No. 2495235; 9/10/85
v.	:	
	:	Nelms No. 2 Mine
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 86-26
Petitioner	:	A.C. No. 33-00968-03621
	:	
v.	:	Nelms No. 2 Mine
	:	
YOUGHIOGHENY AND OHIO COAL	:	
COMPANY,	:	
Respondent	:	

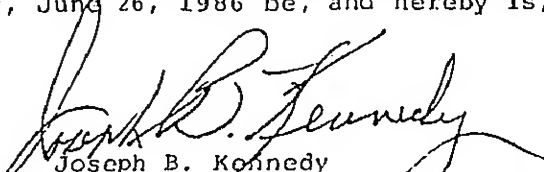
DECISION APPROVING SETTLEMENT

Before: Judge Kennedy

When the parties' motions to withdraw and approve settlement were before me in February, I denied them unless the amount of the settlement proposed was increased from \$150 to \$250. This was based on my belief that the operator's alleged failure to install new bolts to abate the condition cited measurably increased the negligence and gravity of the violation. A review of the Secretary's prehearing submissions, however, shows that MSHA is not claiming that the failure to abate properly changed the character of the violation from that of non-S&S to that of significant and substantial.

The premises considered, therefore, it is ORDERED that the order of February 28, 1986 be, and hereby is, VACATED and the parties motions to withdraw and settle this matter by payment of a penalty of \$150 be, and hereby are, APPROVED.

It is FURTHER ORDERED that the operator pay the amount of the settlement agreed upon, \$150, on or before Friday, July 6, 1986 and that subject to payment the captioned matter be DISMISSED. Finally, it is ORDERED that the hearing scheduled for Thursday, June 26, 1986 be, and hereby is, CANCELLED.

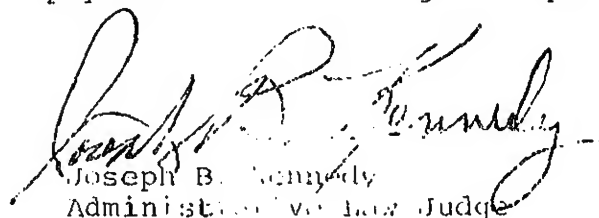

Joseph B. Kennedy

ANN RILEY OWENS,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	ocket No. LAKE 86 33-1
	:	
	:	VINC CD 85-21
MONTEREY COAL COMPANY,	:	
Respondent	:	Monterey No. 2 Mine

DECISION APPROVING SETTLEMENT

Before: Judge Kennedy

For good cause shown, it is ORDERED that the parties confidential settlement agreement and stipulation for settlement and dismissal be received in camera and under seal. It is FURTHER ORDERED that pursuant to such agreement and the parties joint motion to dismiss the settlement be, and hereby is, APPROVED and subject to payment of the sum agreed upon the matter DISMISSED.


Joseph B. Kennedy
Administrative Law Judge

Distribution:

Ms. Ann Riley Owens, 910 Morrison, St. Louis, MO 63104
(Certified Mail)

Thomas C. Means, Esq., Crowell & Moring, 1100 Connecticut
Avenue, N.W., Washington, D.C. 20006 (Certified Mail)

slk

NSOLIDATION COAL COMPANY,
Contestant
v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Respondent

: CONTEST PROCEEDINGS
:
: Docket No. WEVA 86-80-R
: Citation No. 2714701; 12//11/85
:
: Docket No. WEVA 86-103-R
: Order No. 2566327; 1/9/86
:
: Docket No. WEVA 85-209-R
: Citation No. 2422888; 5/30/85
:
: Docket No. WEVA 85-210-R
: Citation No. 2422889; 5/30/85
:
: Docket No. WEVA 85-230-R
: Order No. 2422891; 6/19/85
:
: Docket No. WEVA 85-231-R
: Order No. 2422892; 6/19/85
:
: Docket No. WEVA 85-232-R
: Order No. 2422893; 6/19/85
:
: Docket No. WEVA 85-234-R
: Order No. 2423426; 6/25/85
:
: Docket No. WEVA 85-235-R
: Order No. 2423427; 6/25/85
:
: Buckeye Prep Plant
:
: CIVIL PENALTY PROCEEDINGS
:
: Docket No. WEVA 85-277
: A.C. No. 46-03243-03505
:
: Docket No. WEVA 86-237
: A.C. No. 46-03242-03506
:
: Buckeye Prep Plant

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner
v.

NSOLIDATION COAL COMPANY,
Respondent

Statement of the Proceedings

These consolidated proceedings concern proposals for assessment of civil penalties filed by MSHA against the Consolidation Coal Company (hereinafter Consol) pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for six alleged violations of certain mandatory safety standards found in Part 77, Title 30, Code of Federal Regulations. The contests concern Notices of Contests filed by Consol challenging the legality of three of the citations, and six section 104(b) orders which were issued for Consol's alleged failure to timely abate the citations in question. The citations and orders were issued during mine safety inspections of a refuse pile associated with the Buckeye Preparation Plant located in Stephenson, West Virginia.

These cases were scheduled for hearings in Charleston, West Virginia, during the hearing term June 17 through 19, 1986. However, by motion filed with me on June 5, 1986, pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, the parties seek approval of a proposed settlement of the civil penalty proceedings. Upon approval of the settlement, MSHA requests that the contests be dismissed. The citations, initial assessments, and the proposed settlement amounts are as follows:

Docket No. WEVA 85-277

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement</u>
2022955	9/06/83	77.215(a)	\$ 78.00	\$ 78.00
2022956	9/06/83	77.215(h)	\$ 78.00	\$ 78.00
2123823	10/24/83	77.215(j)	\$ 78.00	\$ 78.00
2422888	5/30/85	75.215-2(c)	\$180.00	\$ 85.00
2422889	5/30/85	77.215-3(b)	\$180.00	\$ 85.00

Docket No. WEVA 86-237

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>	<u>Settlement</u>
27114701	12/11/85	77.215(f)	\$395.00	\$275.00

circumstances concerning the violations, including arguments in support of the proposed reduction of the initial civil penalty assessments for three of the citations. Counsel has also provided a full discussion of the six statutory criteria found in section 110(i) of the Act.

With regard to Citation Nos. 2422888 and 2422889, MSHA's counsel states that they were issued for failure by Consol to file reports and certifications pursuant to 30 C.F.R. § 77.215. Counsel asserts that these violations are of low gravity, are not significant and substantial violations, and would not, in themselves, cause injury or lost work days. Counsel concludes that the proposed settlement reductions are justified.

With regard to Citation No. 27114701, counsel states that it was issued for a violation of 30 C.F.R. § 77.215(f), because an erosion gully in excess of 12 feet deep was causing refuse at the pile to shift and slide material down a hillside toward adjacent residences. However, counsel points out that the violation has been abated in that the erosion gully has been filled and the refuse rediverted away from the residences and nearby stream, and that this was accomplished after a bi-party conference and visitation to the site in February 1986. Counsel also points out that Consol has agreed to develop and submit to MSHA a schedule of a plan to permanently reclaim and rehabilitate the site. In view of Consol's good faith efforts in this regard, counsel believes that the proposed civil penalty settlement reduction is justified.

MSHA recognizes that Consol delayed the abatement of the violations because of its litigation position denying ownership and operation of the refuse pile in question. Consol's position in this regard was rejected by former Commission Judge Richard C. Steffey in his decision of March 1, 1985, in Consolidation Coal Company v. Secretary of Labor, 7 FMSHRC 32 (March 1985). On March 13, 1986, the Fourth Circuit Court of Appeals denied Consol's appeal and affirmed Judge Steffey's decision.

MSHA estimates that approximately one million dollars will be needed to properly rehabilitate the refuse pile in accordance with Federal safety standards, and it recognizes

Conclusion


After careful review and consideration of the pleading and arguments made in support of the proposed settlement disposition of the civil penalty cases, I conclude and find that they are reasonable and in the public interest. Accordingly pursuant to 29 C.F.R. § 2700.30, the settlements ARE APPROVED.

ORDER

Consol IS ORDERED to pay civil penalties in the settlement amounts shown above to MSHA within thirty (30) days of the date of these decisions. Upon receipt of payment, the civil penalty cases are dismissed.

Consol has filed a motion to withdraw Contest Docket No. WEVA 86-80-R, upon approval of the civil penalty which is the subject of Docket No. WEVA 86-237. The motion IS GRANTED, the contest IS DISMISSED.

With regard to the remaining contest dockets, in view of the approval of the companion civil penalty Docket No. WEVA 85-277, I see no reason why these contests should not be dismissed. Accordingly, the remaining contests ARE DISMISSED.


George A. Koutras
Administrative Law Judge

Distribution:

Robert M. Vukas, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

James B. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. VA 85-32-D
ON BEHALF OF : MSHA Case No. NORT CD 84-7
EARL KENNEDY, :
LARRY COLLINS, : Mine No. 1
Complainants :
v. :
RAVEN RED ASH COAL :
CORPORATION, :
Respondent :

AMENDED DECISION

Appearances: Sheila K. Cronan, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for the Complainants;
Daniel R. Bieger, Esq., Copeland, Molinary &
Bieger, Abingdon, Virginia, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainants against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. The complainants contended that they were discharged from their employment with the respondent because of their refusal to work under unsupported roof.

On April 7, 1986, I issued my decision in this case. I concluded and found that the complainants were fired by the respondent because of their refusal to work under unsupported roof. I further concluded and found that the work refusal was protected activity under the Act, and that their discharge by the respondent for this reason constituted a violation of section 105(c)(1) of the Act. The respondent was ordered to pay

less any amounts normally withheld pursuant to State and Federal law, with interest at 9 percent until paid. I also assessed a civil penalty in the amount of \$1,000, for the violations in question, and entered an order requiring the respondent to remit payment of same to MSHA within 30 days.

By motion filed with me on April 23, 1986, MSHA requested reconsideration of my decision of April 7, 1986, to delete the reference to the 9 percent interest rate, and to require the respondent to pay interest on the backpay awards in accordance with the Commission-approved formula in Secretary ex rel. Baile v. Arkansas-Carbona Co., 5 FMSHRC 2042, 2050-2054 (Dec. 1983). MSHA also requested further leave to submit a statement stating the total amount of interest due on the back wage award to each complainant, and suggested that the respondent be given 10 days within which to file a reply. MSHA's motion was granted, and on May 2, 1986, I issued an Amended Decision affording MSHA an opportunity to file its requested monetary relief on behalf of the complainants, and the respondent was afforded an opportunity to file a reply.

By letter and enclosures filed with me on June 2, 1986, MSHA submitted its backpay and interest summaries supported by detailed computations for both complainants. According to these computations, complainant Larry Collins is due backpay in the amount of \$10,600, with interest computed through June 2, 1986, in the amount of \$1,640.57, for a total of \$12,240.57. Complainant Earl Kennedy is due backpay in the amount of \$2,170 with interest computed through June 2, 1986, in the amount of \$403.29, for a total of \$2,573.29. MSHA's computations also reflect that interest will continue to accrue to Mr. Collins through June 30, 1986, in the amount of \$2.94 daily, and to Mr. Kennedy in the amount of .60 daily.

The respondent failed to respond to MSHA's motion of April 23, 1986, for an amended decision, and it also failed to reply to MSHA's submissions concerning the relief due the complainants.

ORDER


1. My decision of April 7, 1986, as amended on May 2, 1986, is further amended to incorporate the aforementioned monetary relief requested by MSHA on behalf of complainants Earl Kennedy and Larry Collins.

\$2,575.29. Interest will continue to accrue to Mr. Kennedy in the amount of .60 daily, through June 30, 1986, and thereafter in any amount computed in accordance with the Arkansas-Carbona Co. formula.

3. Respondent IS ORDERED to pay to the complainant Larry Collins the sum of \$10,600, less any amounts normally withheld pursuant to state and Federal law, with interest computed through June 2, 1986, in the amount of \$1,640.57, for a total of \$12,240.57. Interest will continue to accrue to Mr. Collins in the amount of \$2.94 daily, through June 30, 1986, and thereafter in any amount computed in accordance with the Arkansas-Carbona Co. formula.

4. Respondent IS ORDERED to pay a civil penalty assessment in the amount of \$1,000 for the violations in question.

5. All payments required to be made by the respondent in accordance with my decision, as amended, shall be made within thirty (30) days of the date of this amended decision.


George K. Koutras
Administrative Law Judge

Distribution:

Sheila K. Cronan, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Room 1237A, Arlington, VA 22204 (Certified Mail)

Daniel R. Bieger, Esq., Copeland, Molinary & Bieger, P.O. Box 1296, Abingdon, VA 24210 (Certified Mail)

/fb

ADMINISTRATIVE (ADMIN); : A.C. No. 05-03950-05501
Petitioner :
v. : Cobblestone Pit Mine
COBBLESTONE, LTD., :
Respondent :

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Respondent was absent.

Before: Judge Carlson

This civil penalty proceeding came regularly on for hear at Grand Junction, Colorado on May 2, 1986. At the outset of hearing, counsel for the Secretary of Labor announced that he reached a settlement with the respondent on the previous even which, if approved, would resolve all matters in dispute. He also announced that respondent's representative had elected n to attend the hearing in view of the settlement, but had autho ized him to recite the substance of the agreement for the rec Mr. Lloyd, respondent's representative, has since confirmed t particulars of the agreement by letter.

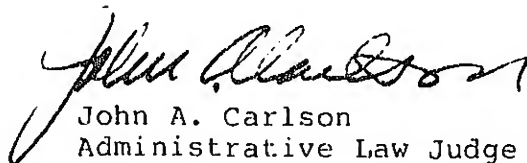
The terms of the settlement are as follows:

The Secretary moves to withdraw citations 2376695 and 2376699 for lack of sufficient evidence.

Of the remaining 18 citations, the penalties for all are be \$20.00 and those which were originally classified as "significant and substantial" are to be classified as "non-significant and substantial."

Based upon the representations of the Secretary at the hearing and the contents of the file, I conclude that the settlement agreement should be approved in all respects.

this decision.



John A. Carlson
Administrative Law Judge

Distribution:

James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Cobblestone, Ltd, Mr. Leonard W. Lloyd, P.O. Box 173, Pagosa Springs, CO 81147 (Certified Mail)

/blc

v. : Cobblestone Pit Mine
:
COBBLESTONE, LTD., :
Respondent :

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Respondent was absent.

Before: Judge Carlson

This civil penalty proceeding came regularly on for hearing at Grand Junction, Colorado on May 2, 1986. At the outset of the hearing, counsel for the Secretary of Labor announced that he had reached a settlement with the respondent on the previous evening which, if approved, would resolve all matters in dispute. He also announced that respondent's representative had elected not to attend the hearing in view of the settlement, but had authorized him to recite the substance of the agreement for record. Mr. Lloyd, respondent's representative, has since confirmed the particulars of the agreement by letter.

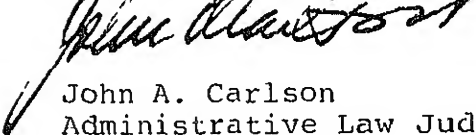
The terms of the proposed settlement are as follows:

The penalty for citation 2376711 is reduced from \$79.00 to \$29.00.

The penalty for combined citation/order 2376712 and 2376713 is reduced from \$225.00 to \$125.00.

Conditioned upon these reductions, respondent agrees to withdraw its notices of contest.

Based upon the representations of the Secretary made upon record and the contents of the file, I conclude that the settlement agreement is appropriate and should be approved.


John A. Carlson
Administrative Law Judge

Distribution:

James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294 (Certified Mail)

Mr. Leonard W. Lloyd, Cobblestone, Ltd., P.O. Box 173, Pagosa Springs, Colorado 81147

/ot

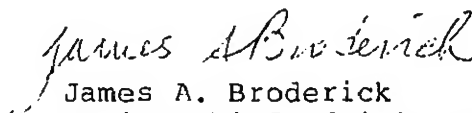
ADMINISTRATION (MSHA),	:	Docket No. WEVA 85-119
Petitioner	:	A. C. No. 46-06646-03502
v.	:	
	:	Docket No. WEVA 85-124
THOMPSON COAL & CONSTRUCTION,	:	A. C. No. 46-06646-03503
INC.,	:	
Respondent	:	River Mine
	:	

ORDER DENYING MOTIONS TO SET ASIDE ORDERS OF DEFAULT

Before: Judge Broderick

On June 13, 1986, the operator filed motions to set aside orders of default and permit filing of answer. Orders of default in these cases were entered on April 27 and April 28 for failure of the operator to submit answers. Pursuant to section 113 of the Federal Mine Safety and Health Act of 1977, these orders became final Commission decisions on June 6 and June 7. No sufficient reason has been offered which would justify relief from the judgment as provided by Rule 60(b) of the Federal Rules of Civil Procedure, as referenced by Commission Rule 1(b), 29 C.F.R. § 2700.1(b).

Accordingly, the motions to set aside the default orders in these cases are DENIED.



James A. Broderick
Acting Chief Administrative Law Judge

Distribution:

Linda M. Henry, Esq., Office of the Solicitor, U. S. Department of Labor, Room 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Charles G. Johnson, Esq., Johnson & Johnson, Thompson Coal & Construction, Inc., 222 Goff Building, P. O. Box 2332, Clarksburg, WV 26301 (Certified Mail)

Mr. James W. Thompson, President, Thompson Coal & Construction Inc., P. O. Box 228, Clarksburg, WV 26301 (Certified Mail)

RALPH CORNETT,	:	
JACK FARLEY,	:	Docket Nos. KENT 85-144-D
JIM ENGLE,	:	KENT 85-145-D
	:	KENT 85-146-D
Complainants	:	KENT 85-147-D
	:	
v.	:	
	:	
HARLAN-BELL COAL, INC., AND	:	
REECE LEMAR,	:	
Respondents	:	
	:	
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket Nos. KENT 85-210-D
ON BEHALF OF	:	KENT 85-211-D
WILLIAM D. SHELL,	:	KENT 85-212-D
RALPH CORNETT,	:	KENT 85-213-D
JACK FARLEY,	:	KENT 85-176-D
JIM ENGLE,	:	KENT 85-177-D
RAYMOND HALCOMB,	:	
CHARLES ROBBINS,	:	
Complainants	:	
	:	
v.	:	
	:	
HARLAN-BELL COAL, INC., AND	:	
SHAUNA DAREASE COAL CO.,	:	
Respondents	:	

DECISION APPROVING SETTLEMENT

Before: Judge Maurer

Statement of the Case

This is a discrimination proceeding initiated by the complainants against the respondents pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, (the Act) charging the respondents with unlawful discrimination against the complainants for exercising certain rights afforded them under the Act. The matter was scheduled for hearing in Berea, Kentucky, on May 21, 1986, but was continued when the parties advised me of a proposed settlement disposition of the dispute.

William D. Shell	\$6,000.00
Ralph Cornett	\$6,088.25
Jack Farley	\$7,678.13
Jim Engle	\$6,542.50
Raymond Halcomb	\$6,000.00
Charles D. Robbins	\$6,542.50

Likewise, the respondents agreed to pay the Appalachian Research and Defense Fund of Kentucky, Inc. the total sum of \$6,500.00 for attorney's fees and expenses. In addition, respondents agreed to expunge the personnel files of the complainants concerning their discharge from employment on or about January 3, 1985, and substitute therefor the agreed upon particular language applicable to each case. In the case of William D. Shell, his personnel file shall also reflect that he was returned to an active work status in September 1985, but due to low coal demands, his employment has again been temporarily suspended. He shall be immediately reinstated to a permanent full-time position at his regular rate of pay when economic conditions improve. In the case of Raymond Halcomb, respondents agreed that his temporary reinstatement is converted to permanent full-time reinstatement at his current hourly wage.

The Secretary waived the assessment of a civil penalty for violations of § 105(c) of the Act in order to facilitate the agreement and thereby provide speedy economic relief to the complainants.

Conclusion

After careful review and consideration of the settlement terms and conditions executed by the parties in this proceeding, including the individual complainants, I conclude and find that it reflects a reasonable resolution of the complaints. Since it seems clear to me that all parties are in accord with the agreed upon disposition of the complaint, I see no reason why it should not be approved.

ORDER

The proposed settlement IS APPROVED. Respondents ARE ORDERED AND DIRECTED to fully comply forthwith with the

Distribution:

F. Taylor, Esq., Office of the Solicitor, U. S. Department
of Labor, 801 Broadway, Room 280, Nashville, TN 37203
(Certified Mail)

Donny Oppengard, Esq., Appalachian Research & Defense Fund of
Kentucky, Inc., P. O. Box 360, Hazard, KY 41701 (Certified
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Andy Yessin, Esq., 411 W. Broadway, P. O. Drawer B, Frankfort
KY 40602 (Certified Mail)

Steve Cundra, Esq., Thompson, Hyde & Flory, 1920 N St., NW,
Washington, DC 20036 (Certified Mail)

Sidney Douglass, Esq., 101 Court St., Harlan, KY 40831
(Certified Mail)

JUN 25 1986

JOHNNIE LEE JACKSON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. CENT 86-36-D
	:	MSHA Case No. MADI 85-17
TURNER BROTHERS, INC.,	:	
Respondent	:	Rogers No. 2 Mine

ORDER OF DISMISSAL

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint initially filed by MSHA on behalf of the complainant Johnnie Lee Jackson against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. Mr. Jackson claimed that he was discharged by the respondent because he made safety complaints concerning an unsafe bulldozer which he operated while in the respondent's employ. Mr. Jackson was involved in an accident while operating the bulldozer, and the respondent claimed that he was fired for causing the accident and that his discharge was in accord with company policy regarding accidents caused by its employees.

On January 22, 1986, MSHA filed an Application for Temporary Reinstatement on Mr. Jackson's behalf, and a hearing on the application was conducted in Muskogee, Oklahoma, on February 5, 1986. Subsequently, on March 18, 1986, I issued a decision denying Mr. Jackson's temporary reinstatement, and a hearing on the merits of the complaint was scheduled for June 25, 1986, in Muskogee, Oklahoma.

On May 5, 1986, MSHA filed a motion to withdraw its representation of Mr. Jackson. As grounds for its motion, MSHA stated that it had "discovered information which would have caused the Secretary to reject Mr. Jackson's complaint had the information been available when the investigation report was reviewed." MSHA stated further that "under these circumstances the Secretary is obligated not to pursue the matter on behalf of Mr. Jackson and not to compel respondent to defend an action that should not have been filed."

led to file such a complaint, and on June 10, 1986, I
ued an Order to Show Cause as to why this matter should not
dismissed because of Mr. Jackson's failure to file a com-
int on his own behalf. Mr. Jackson has failed to respond
my order. Under the circumstances, I conclude and find that
s matter should now be dismissed because of Mr. Jackson's
lure to pursue his complaint.

ORDER

In view of the foregoing, this matter IS DISMISSED. The
ring previously scheduled in Muskogee, Oklahoma, IS CANCELLED.


George A. Koutras
Administrative Law Judge

tribution:

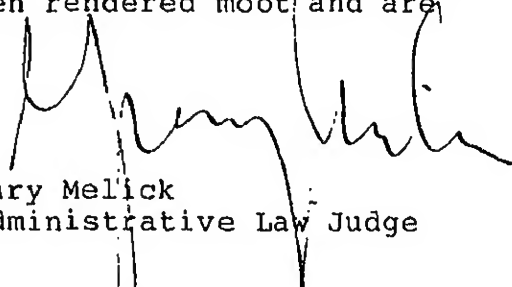
nnie Lee Jackson, Rt. 1, Box 5 (57 Lot 21), Talala, OK 74080
rtified Mail)

ert Petrick, Esq., North Highway 69, P.O. Box 447,
kogee, OK 74402 (Certified Mail)

WHITE COUNTY COAL CORPORATION,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. LAKE 86-58-R
	:	Order No. 2817373; 2/6/86
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. LAKE 86-59-R
ADMINISTRATION (MSHA),	:	Order No. 2817375; 2/21/86
Respondent	:	
	:	Pattiki Mine

ORDER OF DISMISSAL

By interlocutory decision dated June 9, 1986, (Appendix A) the Motions for Summary Decision filed by the Contestant were granted in the captioned cases and the withdrawal orders therein were accordingly modified to citations under section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(a). By letter dated June 24, 1986, Contestant states that it does not dispute either the existence of the violations alleged in these citations or the "significant and substantial" findings associated therewith. Accordingly section 104(a) Citation Nos. 2817373 and 2817375 are affirmed with "significant and substantial" findings. These Contest Proceedings have accordingly been rendered moot and are therefore dismissed.


Gary Mellick
Administrative Law Judge

Distribution:

Timothy M. Biddle, Esq., and Barbara Myers, Esq., Crowell & Moring, 1100 Connecticut Ave., N.W., Washington, DC 20036
(Certified Mail)

James B. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203
(Certified Mail)

rbg

WHITE COUNTY COAL CORPORATION, : CONTEST PROCEEDINGS
Contestant :
v. : Docket No. LAKE 86-58-R
: Order No. 2817373; 2/6/86
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Docket No. LAKE 86-59-R
ADMINISTRATION (MSHA), : Order No. 2817375; 2/21/86
Respondent :
: Pattiki Mine

DECISION

Before: Judge Melick

These cases are before me upon the contests filed by the White County Coal Corporation (White County) under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," to challenge the issuance by the Secretary of Labor of two orders of withdrawal under section 104(d) of the Act.^{1/}

1/ Order No. 2817373 was issued under section 104(d)(1) of the Act. That section reads as follows:

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act."

Order No. 2817375 was issued under section 104(d)(2) of the Act. That section provides as follows:

"If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent

not based on existing practices or conditions actually perceived during an inspection by an inspector as purportedly required by that section of the Act. The essential underlying facts indeed do not appear to be in dispute and I find that White County is entitled to partial summary decision as a matter of law. Commission Rule 64, supra.

On February 6, 1986, an inspector for the Federal Mine Safety and Health Administration (MSHA), Wolfgang Kaak, was conducting an inspection of the White County Pattiki Mine when he discovered that a chalk centerline had been drawn under the unsupported roof of room No. 6 from the last row of permanent supports inby to the face for a distance of 13 feet. It is clear that the inspector was not present when the chalk line was drawn and that he did not observe anyone under the unsupported roof.

The coal drill operator, Darrell Marshall, admitted to Inspector Kaak however that he had drawn the chalk line in question because the mining sequence was behind schedule and he was being pressed to keep his coal drilling process going. Marshall also admitted that he had walked under the unsupported area even though he had seen the red flag warning of the danger. Based upon these observations and admissions, Kaak thereupon issued section 104(d)(1) Withdrawal Order No. 2817373 alleging an unwarrantable violation of the standard at 30 C.F.R. § 75.200. That standard provides in pertinent part that "no person shall proceed beyond the last permanent support"

The order reads as follows:

A chalk centerline was observed on the roof of room No. 6 running from the last row of permanent supports, roof bolts, inby to the face. This area was and had not been supported when the coal drill operator, (D. Marshall), made the centerline on the roof. The distance from the last row of bolts to the face was 13 feet. Working section I.D. 003-0.

The order was terminated 25 minutes later following crew reinstruction on the roof control plan.

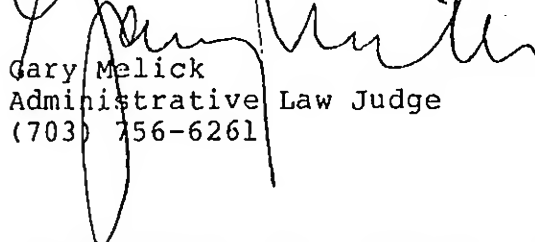
unable to obtain any further information about the incident upon questioning the foreman and miners in the area. Kaak nevertheless then issued section 104(d)(2) Order No. 2817375 alleging an unwarrantable violation of 30 C.F.R. § 75.200. The order reads as follows:

Physical evidence, footprints, were observed going through an area of unsupported roof in the X-cut between Entry No. 6 and Entry No. 7 at curve Y spad No. 1773. The opening averaged about 10 feet long by 10 feet wide. The height average was 6 feet. The area was rock dusted and foot prints were clearly visible. Work section I.D. 002-0.

This order was terminated about 1 hour later after the crew was again reinstructed on the roof control plan and the area had been permanently supported.

Citing the decisions of 5 Commission Administrative Law Judges (Westmoreland Coal Company, Docket Nos. WEVA 82-34-R et al, May 4, 1983, Judge Steffey; Emery Mining Corporation, 7 FMSHRC 1908, 1919 (1985), Judge Lasher; Southwestern Portland Cement Company, 7 FMSHRC 2283, 2292 (1985), Judge Morris; Nacco Mining Company, 8 FMSHRC 59 (1986), Chief Judge Merlin, review pending; Emerald Mines Corporation, 8 FMSHRC 324 (1986), Judge Melick, review pending) White County maintains that the section 104(d) orders herein are invalid because they were not issued based upon a finding by an MSHA inspector of an existing violation of the Act or a mandatory standard.

It is not necessary to here restate the supportive rational of the cited decisions. It is sufficient to state that I am in agreement with the rational of those decisions and the principles stated therein that section 104(d) orders cannot be issued based upon a finding by the inspector of a violation that has occurred in the past but no longer then exists. It is undisputed in this case that the inspector did not observe any violations being committed but that he based his issuance of the 104(d) orders before me upon evidence of past violations. Accordingly White County's motion for partial summary decision is granted and the orders at bar are accordingly modified to citations under section 104(a) of the Act.


Gary Melick
Administrative Law Judge
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rbg

MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 85-260
Petitioner : A. C. No. 36-00906-03584
 :
v. : Gateway Mine
 :
TEWAY COAL COMPANY, :
Respondent :

DECISION

Appearances: Linda M. Henry, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Penn-
sylvania, for Petitioner;
George S. Brooks, Esq., Lexington, Kentucky,
for Respondent.

Before: Judge Maurer

Statement of the Case

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. section 801, et seq., the "Act," in which the Secretary initially had charged the Teway Coal Company with five (5) violations of the mandatory safety standards. However, prior to the commencement of taking testimony in this case, the Secretary vacated 104(a) Citation Nos. 2398789 and 2398784 and also withdrew the civil penalty assessment concerning Citation No. 2397333. I approved the vacation and withdrawal of the above three (3) citations on the record.

The remaining two alleged violations were tried before me at a scheduled hearing on April 23, 1986, at Pittsburgh, Pennsylvania.

The general issues before me are whether the company has violated the regulatory standards as alleged in the petition and, if so, the appropriate civil penalty to be assessed for the violation(s).

Since the respondent readily admits the regulatory violations of 30 C.F.R. § 75.1725(a) alleged in Citation No. 2399220 (GX-1) and 30 C.F.R. § 75.1403 alleged in Citation

At the hearing, the parties agreed to the following stipulations which were accepted (Tr. 7-8):

1. The Gateway Mine is owned and operated by the Gateway Coal Company.

2. The Gateway Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The undersigned administrative law judge has jurisdiction over these proceedings.

4. The subject citations were properly served by a duly authorized representative of the Secretary of Labor, upon an agent of the respondent, at the dates, times, and places stated in the citations, and may be admitted into evidence for the purpose of establishing their issuance, but not necessarily for the truthfulness or relevance, or any of the statements contained therein.

5. The assessment of the civil penalties in this proceeding will not affect the respondent's ability to stay in business.

6. The appropriateness of the penalties, if any, to the size of the coal operator's business should be based on the fact that the Gateway Mine's annual production tonnage, as of the time of the issuance of the citations, was nine hundred and sixty-one thousand, one hundred and sixty-six (961,166).

7. The respondent demonstrated ordinary good faith in attaining compliance after the issuance of each citation.

8. The Gateway Mine was issued three hundred and thirty seven (337) citations in the twenty-four months immediately preceding the issuance of these citations involved in this case.

9. The parties stipulate to the authenticity of the exhibits to be entered.

is a violation of 30 C.F.R. § 75.1725(a) and is admitted by the operator.

Section 104(a) Citation No. 2397217 was issued to the company because another personnel carrier (jeep) did not have the required reflectors on one side. The company had previously been issued a notice to provide safeguards requiring that all self-propelled personnel carriers (jeeps) be equipped with reflectors on both ends and both sides (GX-4). This is a violation of 30 C.F.R § 75.1403 and again is readily admitted by the operator.

Inspector Francis E. Wehr testified that he issued § 104(a) Citation No. 2397217 on February 1, 1985, during an inspection of the Gateway Mine. In his opinion, since the jeep was missing reflectors on the tight side, the hazard created was that if it was coming on to a piece of track haulage at a particular angle and if an oncoming piece of equipment was coming, there could be a collision and individuals could be injured. He assessed the likelihood of such an event occurring as "reasonably likely" and he would expect injuries ranging from bruises to broken bones as a result of the collision. He therefore assessed this violation as a "significant and substantial" (S&S) one.

During cross-examination of Inspector Wehr, Citation No. 2397139, which was originally a notice to provide safeguards, was introduced (RX-1). This document was issued to the Gateway Coal Company on January 4, 1985, by Inspector Wehr because he had observed a jeep being operated without any reflectors at all, on either ends or sides. On this occasion, the inspector did not mark the "S&S" box. His first explanation of that was that he made a mistake, that it should have been marked "S&S." He later amended his response to state that this document had originally been issued as a safeguard under section 314(b) of the Act and when issuing a safeguard you are not concerned with the criteria for determining whether a violation would be "significant and substantial." However, I note that he also stated that the penalty criteria do not apply when issuing a safeguard. That for purposes of issuing a safeguard, whether there would be an injury, the likelihood of that injury or what the negligence would be are not considered. Yet, when he issued Citation No. 2397139, as a

As it turns out, this citation should not have been issued as a safeguard at all because a safeguard for the same thing had previously been issued by Inspector Light on May 29, 1984 (GX-4). Inspector Light issued Citation No. 2253769 as a safeguard and likewise did not mark the "S&S" box. He did, however, mark the penalty criteria. He checked the boxes for "none" pertaining to negligence, "unlikely" occurrence and "lost workdays or restricted duty" as type of injury.

When it was subsequently discovered that there was an existing safeguard issued concerning jeep reflectors, Inspector Wehr modified Citation No. 2397139 from a safeguard to a § 104(a) citation on January 23, 1985. However, even though he concedes he could have, he did not at that time modify this citation to reflect an "S&S" violation.

Although Inspector Wehr testified on direct that the lack of a reflector on the tight side of the jeep would be reasonably likely to cause an accident, it is apparent to me that he changed his mind sometime between issuing Citation No. 2397139 on January 4, 1985, and February 1, 1985, when he issued the citation at bar. Further, he has no knowledge of any statistics concerning accidents caused by missing reflectors nor was he able to cite a single example of an accident caused by a missing reflector. This last observation also applies to the opinion testimony of the two miner witnesses concerning gravity.

The Commission in Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981) set out the test for determining whether a violation, in the words of the statute, "... could significantly and substantially contribute to the cause and effect ... of a mine safety or health hazard." Such a violation, the Commission held, is one where there exists "... a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature."

Later, in Mathies Coal Co., 6 FMSHRC 1 (1984), the Commission applied the definition of "significant and substantial" in four steps. The first step was whether a violation occurred. In this case that much is admitted by the respondent. The second step is whether the violation contributed a measure of danger to a discrete safety hazard.

step is whether there is a reasonable likelihood that the injury in question will be of a reasonably serious nature. I think we would all agree that if a collision accident occurred involving two of these jeeps, traveling at anything more than a minimal rate of speed that injuries of a reasonably serious nature would likely occur. Therefore, the ultimate issue is whether the absence of reflectors on the jeep would be reasonably likely to cause such an accident. At the hearing, and within the four corners of the citation at bar, Inspector Wehr was of the opinion that such an occurrence was "reasonably likely." However, less than a month before, in the same mine, for the same violation, involving the same type of vehicle, he was of the opinion that there was "no likelihood" of such an occurrence (RX-1). Therefore, I conclude that the respondent has effectively impeached the inspector by his own prior inconsistent statement on the ultimate issue of this case. Further, a second inspector, Mr. Light, also had occasion to write a safeguard for this identical violation of the same standard, in the same mine and involving the same type of equipment (GX-4). His opinion was that the occurrence of the event against which the cited standard is directed was "unlikely." Additionally, I note that an inspector could change his mind over a period of time about the seriousness of a particular regulatory violation but here there is less than a month between Inspector Wehr's "writings" on this identical subject and in any case, there is no evidence in this record of any empirical substantiation of his current opinion that this violation was "S&S." I therefore conclude that the cited violation was non "S&S."

Turning now to the matter of the inoperative dead man switch cited in § 104(a) Citation No. 2399220, the issue is once again whether this admitted violation is a "significant and substantial" one.

I have some problem with what I perceive to be an inconsistent position taken by the Secretary with regard to the importance of the dead man switch as a safety item on jeeps used in the mines. To begin with, the Act directs

not required to be installed on the jeep to begin with, and could in fact have been completely removed by the operator at any time. The only violation herein involved leaving the switch on the jeep in an inoperable condition.

In this one case, the Secretary takes the position that this is a "significant and substantial" violation of the mandatory standards "reasonably likely" to cause a "fatal" injury. Yet, at the same time, the Secretary admits that the dead man switch is not a required piece of equipment on this jeep and in fact other jeeps are operating without one in the same mine, apparently with the Secretary's blessing.

I conclude that if it truly is a "significant and substantial" safety hazard to operate a personnel carrier with an inoperable dead man switch, the Secretary, by regulation, would require such a switch in the first instance.

At the hearing, the Secretary's counsel argued that a jeep that has an inoperable dead man switch is not the equivalent of a jeep without such a switch at all, because of the potential for reliance on the availability of the switch and the assumption that it works. A case for this position possibly could be made. However, the evidence adduced at the hearing was to the effect that the only accident that any witness could recall involving a throttle sticking open was on a vehicle that didn't have a dead man switch installed, and therefore was presumably not in violation of anything. The only other evidence on the significance of this violation was an opinion which was not factually supported in the record.

The test is whether this violation has a reasonable likelihood of resulting in serious injury. I do not find any evidentiary support for that in this record and therefore I do not find that the violation was "significant and substantial." Mathies Coal Company, supra.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and considering the criteria contained in section 110(i) of the Act, respondent is assessed a civil penalty in the

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of \$40 within thirty (30) days of the date of this decision. Payment is to be made to MSHA, and upon receipt of same, this proceeding is dismissed.

A handwritten signature in black ink, appearing to read "Roy J. Maurer", written in a cursive style.

Roy J. Maurer
Administrative Law Judge

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George S. Brooks, Esq., 1200 First Security Plaza, Lexington, KY 40507 (Certified Mail)

v.
C. D. LIVINGSTON,
Respondent

: Digmor Placer Mine
:
:
:
:

DECISION

Appearances: Carol A. Fickenscher, Esq., Office of the Solicitor
U.S. Department of Labor, San Francisco, California
for Petitioner;
Mr. C. D. Livingston, Iowa Hill, California,
pro se, for Respondent.

Before: Judge Lasher

This proceeding was initiated by the filing of a petition for assessment of a civil penalty by the Secretary of Labor (herein the Secretary) on April 1, 1985, pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 820(a)(1977) (herein the Act). A hearing on the merits was held in Sacramento, California on April 9, 1986, at which the Secretary was represented by counsel and the Respondent, Mr. C.D. Livingston, represented himself.

The Secretary seeks assessment of a penalty against Respondent for violation of 30 C.F.R. § 57.4-52 ^{1/} which was described in combination Citation (Section 104(a)) Order (Section 107(a)) No. 2363585 issued May 17, 1984, as follows:

"A 4-cylinder gasoline powered front-end loader is being used underground to muck out the sand and gravel and haul [sic] the material to the surface.

CO Drager gas detector measurements at the face 50 ppm one stoke."

1/ "Gasoline shall not be stored underground, but may be used only to power internal combustion engines in nongassy mines that have multiple horizontal or inclined roadways from the surface large enough to accommodate vehicular traffic. Roadways and other openings shall not be supported or lined with combustible material. All roadways and other openings shall be connected to another opening every 100 feet by a passage large enough to accommodate any vehicle in the mine."

gassy mine (Tr. 51-53). However, it has but one horizontal or inclined roadway from the surface large enough to accommodate vehicular traffic, in this case, a tunnel (Tr. 28).

On May 17, 1984, MSHA Inspector Nicholas Esteban, having been assigned to inspect another mine, a surface mine, located on the same Digmor Placer property, observed the subject underground gold mine and undertook to inspect the same (Tr. 14-15, 39-41, 46-49, 71). Respondent Livingston owns the 80-acre Digmor Placer property, and leases the surface mine to others (Tr. 71, 72, 77).

Inspector Esteban came upon the Respondent (Tr. 15) who at first refused to allow his mine to be inspected on the basis that his was a "one-man" operation (Tr. 15) but subsequently acceded to the Inspector's request and signed a CAV (compliance assistance visit) request after the Inspector indicated to him that the inspection was to be a "courtesy" inspection and after the Inspector told him that no penalties would derive from the issuance of any notices of violation ^{3/} (Tr. 15, 16, 18, 21, 22, 42, 43, 60). The Inspector and Mr. Livingston then walked into the mine (Tr. 23).

The Inspector took a Drager gas detector measurement which indicated the air inside the mine was contaminated with carbon monoxide (50 parts per million) (Tr. 23). The Inspector informed Mr. Livingston of this result and advised him a Citation/Order rather than a CAV "notice" would be issued for this violation (Tr. 24). Mr. Livingston became upset at this point, but ad-

2/ In Secretary v. Consolidation Coal Company, 6 FMSHRC 189 (1984), the Commission held that S & S findings may be made in connection with a citation issued under Section 104(a) of the Act. Considering this ruling in conjunction with U.S. Steel Mining Company, 6 FMSHRC 1834 (1984), where the mine operator was allowed to contest S & S findings entered on Section 104(d)(1) citations in a penalty case, it is concluded that S & S findings contained in a Section 104(a) Citation similarly are properly reviewable in this penalty proceeding.

3/ Notices of violation, which are issued on CAVs instead of Citations, are on a form approximately 1/3 the size of a regular Citation form (Tr. 20).

were present (Tr. 73).

The gasoline-powered engine emitted carbon monoxide and it did not have a water scrubber or a catalytic converter "to help burn off the carbon monoxide." (Tr. 26).

Inspector Esteban advised Mr. Livingston that he could not leave the property without issuing the imminent danger order (Tr. 24, 31) because someone could be killed using a gasoline-powered engine underground. The mine did not meet the regulation's criteria for using gasoline powered equipment (Tr. 27, 28) since it did not have multiple roadways from the surface, but only a single tunnel (Tr. 28, 52, 54). There existed a serious hazard from carbon monoxide poisoning (Tr. 26, 30, 32, 34, 72-73, 75), which could result in a fatality (Tr. 30, 34). As many as 4 persons had worked in the mine in the past (Tr. 28, 44-46, 66, 67, 76), and Mr. Livingston and his "partner" were currently working in the mine (Tr. 28, 72-73).

The lethal nature of carbon monoxide poisoning was described by the Inspector as follows:

"Because if he gets a high concentration of carbon monoxide, you can't smell the gas, you can't detect it. All of a sudden you're down, and you're dead."
(Tr. 34).

Mr. Livingston had been using the gasoline-powered loader two or three times a week for 4 or 5 years (Tr. 66). He intended to dispose of the loader at the time of the inspection and so advised the inspector (Tr. 61-62). Mr. Livingston thereafter sold the loader to one Douglas Mead, who he first characterized as a "junk dealer" (Tr. 64), but subsequently in his testimony, it also turned out that Douglas Mead was one of those who worked in the mine (Tr. 67) and the same person Mr. Livingston said was his "partner" (Tr. 73). Mr. Livingston closed the mine 2 or 3 weeks after the CAV inspection (Tr. 62, 76).

Following the inspection, Inspector Esteban issued 4 CAV-type notices of violation (Tr. 22) in addition to the Citation/Order which is the subject of this proceeding.

At the hearing, Mr. Livingston who, it should again be mentioned, was not represented by counsel, offered an undated letter (Ex. R-1) which he had sent to the Secretary's counsel subsequent to the issuance of the Citation/Order. In the first

anyone else has shown proof that it was the intent of Congress to subject the one-man mine operator to the burden of these rules and regulations. Neither you, nor anyone in your office has ever quoted a court case that pertained to a one-man operation. Every case you cite has had paid employees or several people working."

However, at the hearing, Mr. Livingston testified under oath to a somewhat contrary picture of the employment situation at mine.

Q. Do you have friends or acquaintances or relatives that have worked at the Digmor Placer with you, and when I use the term "Digmor Placer", I'm referring to the specific mine that Mr. Esteban inspected?

The Witness: Do I ever have someone with me?

Q. During the time that you were working it?

A. Okay. Occasionally I have had people help me.

Q. Who were those people that helped you?

A. My son.

Q. Anyone else?

A. Yeah. There was a Ron Stockman. He helped me for just a few days is all, but that didn't last long.

Q. Anyone else?

A. Yeah, Douglas Mead. He helped me for a while.

Q. So, you really weren't working that by yourself?

A. I was working it alone by myself most of the time.

Q. But you had other people there?

A. I had, occasionally, some people there, yes.

(Tr. 66, 67).

Based on his sworn testimony, Mr. Livingston's contention that this was a "one-man" operation is rejected. Regardless, his

"The point I'm trying to make is that he told me there would be no finable, assessable violations per se; and you won't have to pay a fine and this and that, and then he writes me up one for a loader which I already told him I was getting rid of."

(Tr. 63)

It is first noted that the "compliance assistance visit" process is not provided for in the Act. The Secretary, although requested (Tr. 81), has not furnished the source of MSHA's CAV policies. On the other hand, the gold mine in question is subject to the Act and inspections thereof are mandated by the Act, Section 103(a), 30 U.S.C. § 815. Regardless of the Inspector's promises, the Act requires that a penalty be assessed when a violation occurs. Old Ben Coal Co., 7 MSHRC 205, 208 (1985); Section 110(a), 30 U.S.C. § 820. The record is not absolutely clear that the Inspector utilized the CAV policy to overcome Respondent's refusal of entry, but it strongly appears such was the case (Tr. 10, 15, 16, 42, 43, 60) and I do so infer and find.

A preliminary question is thus posed: whether Respondent, had any right to deny entry to begin with. In the circumstances established in this record, I find that Respondent had right to deny the Inspector entry to the mine to conduct an inspection. In Secretary of Labor v. Calvin Black Enterprises MSHRC, 1151 (1985), the Commission succinctly enunciated the principles relating to such denial of entry:

"The law on denial of entry under the mandatory inspection provisions of section 103(a) of the Act is clear. Section 103(a) expressly requires that no advance notice be given an operator prior to an inspection and gives authorized representatives of the Secretary explicit right of entry to all mines for the purpose of performing inspections authorized by the Act. The Supreme Court has upheld the constitutionality of these provisions. Donovan v. Dewey, 452 U.S. 594, 598-608 (1981). Consistent with that decision, we have held that an operator's failure to permit such inspections constitutes a violation of section 103(a). Waukesha Lime & Stone Co., Inc., 3 FMSHRC 1702, 1703-04 (July 1981); United States Steel Corp., 6 FMSHRC 1423, 1430-31 (June 1984)." (emphasis supplied).

equitable standpoint for Respondent's argument that the Inspector's "no penalty" promise should bind the Secretary and excuse Respondent from the requirements of the Act. Certainly the Inspector's promise does not in these circumstances-where Livingston's refusal to permit an inspection is itself a violation-work a serious injustice to Mr. Livingston, See U.S. v. Lazy F.C. Ranch, 481 F.2d 985 (9th Cir, 1973). Similarly, since several miners were endangered by Respondent's intransigence, public interest as reflected in the purposes behind the safety standard infringed would not be served by estopping the enforcement agency from disavowing the misstatement of its agent.

In any event, in Secretary of Labor v. King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981), the Commission has rejected the doctrine of equitable estoppel. It also viewed the erroneous action of the Secretary (mistaken interpretation of the law leading to prior non-enforcement) as a factor which can be considered in mitigation of penalty, stating:

"The Supreme Court has held that equitable estoppel generally does not apply against the federal government. Federal Crop Insurance Corp v. Merrill, 332 U.S. 380, 383-386 (1947); Utah Power & Light Co. v. United States, 243 U.S. 389, 408-411 (1917). The Court has not expressly overruled these opinions, although in recent years lower federal courts have undermined the Merrill/Utah Power doctrine by permitting estoppel against the government in some circumstances. See, for example, United States v. Georgia-Pacific Co., 421 F.2d 92, 95-103 (9th Cir. 1970). Absent the Supreme Court's expressed approval of that decisional trend, we think that fidelity to precedent requires us to deal conservatively with this area of the law. This restrained approach is buttressed by the consideration that approving an estoppel defense would be inconsistent with the liability without fault structure of the 1977 Mine Act. See El Paso Rock Quarries, Inc., 3 FMSHRC 35, 38-39 (1981). Such a defense is really a claim that although a violation occurred, the operator was not to blame for it.

Furthermore, under the 1977 Mine Act. an equitable consideration, such as the confusion engendered by conflicting MSHA pronouncements, can be appropriately weighed in determining the appropriate penalty (as the judge did here)."

violation. Although Respondent did not challenge that it was a significant and substantial (S & S) violation or that it resulted in an imminent danger, it should be mentioned with regard to the S & S charge in the Citation that the Commission has held that a violation is properly designated S & S "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

"In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature."

The Commission has explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co. 6 FMSHRC 1834, 1836 (August 1984). The Commission has emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be S & S. See 6 FMSHRC at 1836.

On this record, and in view of the findings heretofore made, there is no question but that a violation of 30 C.F.R. § 57.4-5 occurred and that a "measure" of danger to safety was contributed to by such.

Based on the prior findings as to the absence of multiple roadways into the mine, the lethal nature of carbon monoxide poisoning, the results of Inspector Esteban's gas detector measurements, (Tr. 23, 28-32), the lack of a water scrubber and catalytic converter on the engine, and the number of miners (including Mr. Livingston when he was working alone) who were exposed to the danger (Tr. 71-73), it is clear that there was a reasonable likelihood that the hazard (carbon monoxide poisoning) contributed to by the violation would result in an injury of a

to support a reasonable belief on the part of an inspector that an imminent danger exists. It would seem that in all cases a violation which results in an imminent danger would also be S & S while the reverse would not necessarily be true. Determining whether the factors constituting the instant violation, taken in combination with evidence relating to S & S (similar to imminent danger except in degree and immediacy) as well as other evidence-which is not necessarily relevant to the violation or the S & S determination - meets the level of proof required to justify the "imminent danger" order is aided by a brief consideration of the evolution of this term.

The term "imminent danger" is found in both the Federal Coal Mine Health and Safety Act of 1969 and the Amendments thereto which comprise the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., and the definition thereof currently found in section 3(j) of the 1977 Act is for all intents and purposes identical in both Acts, to wit:

"the existence of any condition or practice in a coal or other mine ^{4/} which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

Historically, the first tests for determining whether an imminent danger exists or not were set forth in Freeman Coal Mining Corp., 2 IBMA 197, 212 (1973), and Eastern Associated Coal Corp., 2 IBMA 128, 80 I.D. 400 (1973), aff'd Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals et al., 491 F.2d 277 (4th Cir., 1974). In Eastern, supra, the Board of Mine Operations Appeals, formerly a division of the Interior Department's Office of Hearings and Appeals, herein "BMOA", held that:

* * * an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated. The dangerous condition

^{4/} By virtue of Section 102(b)(4) of the 1977 Mine Act the phrase "or other" was added after the word "coal" to expand the Act's coverage to all mines.

"no," then an imminently dangerous situation exists and the issuance of a 104(a) withdrawal order is not only proper but mandatory under the Act.

In Freeman, supra, the BMOA elaborated on its decision in Eastern and held that the word "reasonably" as used in the definition of imminent danger necessarily means that the test of imminence is objective and that the inspector's subjective opinion is not necessarily to be taken at face value. The Board also gave this 2-sentence test of "imminent danger:"

* * * would a reasonable man, given a qualified inspector's education and experience, conclude that the facts indicate an impending accident or disaster, threatening to kill or to cause serious physical harm, likely to occur at any moment, but not necessarily immediately? The uncertainty must be of a nature that would induce a reasonable man to estimate that, if normal operations designed to extract coal in the disputed area proceeded, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger. (Emphasis added)

The United States Court of Appeals for the 7th Circuit in Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, et al., 504 F.2d 741 (1974), while quoting with surface approval the BMOA's definition of "imminent danger," went on to add its own:

An imminent threat is one which does not necessarily come to fruition but the reasonable likelihood that it may, particularly when the result could well be disastrous, is sufficient to make the impending threat virtually an immediate one. (Emphasis supplied)

In Canterbury Coal Corporation v. Mining Enforcement and Safety Administration (MESA), Docket No. PITT 74-57 (January 24, 1975, ALJ Decision; unreported), the extreme but plain meaning of the second sentence of the BMOA's imminent danger test was questioned:

"I conclude, after reviewing the Board's decisions in Freeman and Eastern, the decisions from the 4th and 7th Circuits on appeal therefrom, and subsequent Board decisions, that the Board, by its use of the phrase "at least just as probable as not" in the Freeman case, did not set up a pure mathematical equation for determining whether it is reason-

ly, I do not believe the Board intended to require that the odds be even that if normal operations continued the danger would come to fruition, or to hold that there must appear to be a 50/50 chance ... that the tragedy or disaster would occur, to justify the issuance of a closure order. It most certainly is clear from factual analysis of the Board's numerous "imminent danger" decisions that the lives and well-being of miners are not to ride on the same law of statistical probabilities found in the toss of a coin. Accordingly, I reject any such interpretation of the Freeman test."

Thereafter, during the process of the enactment of the 1977 t, the Senate Committee on Human Resources, made this statement:

"The Committee disavows any notion that imminent danger can be defined in terms of a percentage of probability that an accident will happen; rather the concept of imminent danger requires an examination of the potential of the risk to cause serious physical harm at any time. It is the Committee's view that the authority under this section is essential to the protection of miners and should be construed expansively by inspectors and the commission." (Leg. Hist. of the Federal Mine Safety & Health Act of 1977, 95th Cong., 1st Sess. (hereinafter Leg. Hist. 1977 Act) at 38.)

The Commission, in Pittsburg & Midway Coal Mining Company v. Secretary of Labor, (2 MSHRC 787, 788; 1980) also set a different course for approaching imminent danger questions:

". . . we note that whether the question of imminent danger is decided with the "as probable as not" gloss upon the language of section 3(j), or with the language of section 3(j) alone, the outcome here would be the same. We therefore need not, and do not, adopt or in any way approve the "as probable as not" standard that the judge applied. With respect to cases that arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., we will examine anew the question of what conditions or practices constitute an imminent danger."

(emphasis added)

Research of this question leads one to believe that the literal meaning of the "at least just as probable as not" (emphasis supplied) language, has for the most part been

of Labor v. Pittsburg & Midway Coal Mining Company, 8 FMSHRC 4 (1986). Accordingly, the "at least just as probable as not" formula contained in the BMOA's Freeman decision, supra, will be used here as the sounding board for determining the existence of imminent danger.

Since the Commission's Pittsburg & Midway decision, there have been relatively few imminent danger matters in litigation before the Commission. Under the 1977 Act, decisional emphasis seems to be on the individual factual configurations involved rather than on discrete tests and formulas for determining imminent danger. See, for example, Secretary of Labor v. U.S. Steel Corporation, 4 FMSHRC 163 (1982). At this time, the Act's section 3(j) definition appears to be the primary legal touchstone. Evaluating the dangerous condition or practice - whether or not a violation - in the perspective of continued mining operations also appears to be a prerequisite in determining the validity of an imminent danger order. There also is a case for treating these as prerequisites: (1) that the hazard (risk) found must be one reasonably likely to induce fatalities or injuries of a reasonably serious nature, and (2) that such hazard or risk have an immediacy to it, that is, it could come to realization "at any time."

In adopting the above concepts, a review of the factual underpinnings for the Inspector's conclusions is required. It is found therefrom that the Inspector properly issued an imminent danger order based on (a) those findings previously made in connection with the S & S issue and (b) these additional probative evidentiary factors:

1. Carbon monoxide is undetectable, as the Inspector testified:

"... if he gets a high concentration of carbon monoxide you can't smell the gas, you can't detect it. All of a sudden you're down, and you're dead." (Tr. 34)

2. Respondent's admission that he used the front-end loader "two or three days a week" over a period of four or five years (Tr. 66, 72), and underground for a period of 2 months (Tr. 70-72) on occasions when other miners were present (Tr. 73).

3. Respondent's admission that he knew that operating the gasoline-powered loader was dangerous (Tr. 75) coupled with the extent of his prior use of the same compels the inference of

Based on the foregoing substantial evidence it is concluded that the Inspector exercised correct and reasonable judgment in determining that an imminent danger existed on May 17, 1984, since there existed both (1) a practice and (2) conditions in the subject mine which reasonably could be expected to cause death or serious physical harm at any time had normal mining operations been permitted to continue and before such condition and practice could have been abated. The imminent danger withdrawal order is thus affirmed.

RULING ON SECRETARY'S MOTION

The Secretary, at the end of his post-hearing brief received May 23, 1986, and in the 11th hour of the Judge's jurisdiction in this matter, states that in keeping with the Secretary's "policy of conducting Compliance Assistance visits, a penalty should not have been assessed", going on to add:

"Since the inception of the CAV program in 1979, MSHA policy has been to not propose penalties for violations observed during the course of a CAV reopening inspection (Metal - Nonmetal Assistance Program) or § 303(x) reopening inspection (Coal Mine Assistance Program). This violation was not identified as observed during a CAV inspection, hence, trial counsel is now advised that it inadvertently received a proposed penalty."

(emphasis added)

The last sentence of the Secretary's brief more clearly indicates what the Secretary intended:

"Plaintiff therefore withdraws the penalty assessment and respectfully requests that the citation/order be upheld."

The requests therein for both (a) withdrawal, and (b) review of the Citation/Order are contradictory. Thereafter, in response to my Order to Show Cause, the Secretary clarified this motion to show that he was moving to withdraw the petition and that indeed such should result in dismissal of the entire proceeding and preclude review of the Citation/Order.

Commission Rule 11 provides that a party may withdraw a pleading at any stage of a proceeding with the approval of the Commission or the Judge". (emphasis supplied). Both the form and timing of the attempted withdrawal here are of some concern since the motion was filed after the matter had proceeded

not shown-or alleged-any basis why or how Section 110(a) of the Act can be ignored. The impropriety of the Inspector's CAV promises not to issue citations was litigated. As above noted Section 110(a) requires that a penalty be assessed when a violation occurs and this also is a principle of mine safety law. See U.S. Steel Mining Co., Inc., 6 FMSHRC 1148 (1984); Tazco, Inc., 3 FMSHRC 1895 (1981). Whatever the Secretary's CAV procedures are - again the Secretary, although requested (Tr. 81), has not submitted any written documentation reflecting what his CAV procedures or policies are - the Secretary has not shown how a mandatory provision of the Mine Act can be waived in this matter or why it should be. I am unaware of any basis upon which such can be waived. Even the Secretary's "policy" as articulated in his brief - applicable only where a mine is being reopened isn't clearly relevant. Also, and as previously found, the Secretary should not be estopped from enforcing the Act and the public's interest in this matter.

Some situations where the Secretary, after Commission jurisdiction attaches, might be permitted to drop its prosecution are usefully compared:

1. where the parties, before entry of a final agency decision, reach an appropriate settlement;
2. where the Secretary, after further investigation on or off the record of a formal adversary hearing, concludes that a violation was not committed;
3. where some late-discovered jurisdictional defect is discovered;

As best I divine it, if it is not self-application of the estoppel defense, the Secretary's purpose here is simply to protect the credibility of its CAV process. But this is both unusual and isolated case where such is not significantly threatened. As previously discussed, there certainly is no inequity or unfairness which would result from not dismissing this matter. Mine safety clearly is best served by not aborting the proceeding at this juncture; where the public interest rests is well demonstrated on this record. Dismissal of this de novo proceeding where the Commission's jurisdiction has been locked and a record developed would more likely bring in to question proper discharge of the administrative-judicial responsibility than the enforcement process. Accordingly, in the exercise of

spector's special S & S findings and finding that an imminent danger existed are supported in the record. There remains the determination of an appropriate penalty. The mine in question a very small one which is now out of business (Tr. 62). Since there were no previous inspections (Tr. 63) Respondent has no history of previous violations. Respondent makes no claim that payment of a penalty to use the words of the Act, will jeopardize "his ability to continue in business", or, more appropriately here, that he is unable to pay a penalty. 6/ Since Respondent never used the front-end loader in question after the Citation/Order was issued, it is concluded that Respondent, after notification of the violation, proceeded in good faith to promptly achieve compliance with the safety standard violated. The record is clear that this was a serious violation which created an imminent danger and that Respondent was highly negligent in its commission (Tr. 34, 75). The Inspector's indecorous preliminaries, as previously noted, do not call for downward penalty adjustment. After weighing these various penalty assessment criteria mandated by the Act, a penalty of \$150.00 is found appropriate.

ORDER

1. Citation/Order No. 2363585 is affirmed in all respects

2. Respondent, if he has not previously done so, shall pay the Secretary of Labor within 30 days from the date hereof the sum of \$150.00 as and for a civil penalty.

Michael A. Lasher, Jr.

Michael A. Lasher, Jr.
Administrative Law Judge

5/ It may be that as a matter of supporting enforcement policy the Secretary should have the absolute right to withdraw his initial pleading at any time before final decision by (a) the trial level judge or (b) the Commission. I am, however, unable to draw such a line absent clarifying Commission policy or distinguishing precedent. The Secretary has not cited, nor do I know of, any basis for such proposition. The facts of this particular matter do not provide an illustration for removing Commission review of withdrawal requests.

6/ In the absence of proof that the imposition of otherwise appropriate penalties would adversely affect a mine operator's

Mr. C.D. Livingston, P.O. Box 661, Iowa Hill, CA 95713
(Certified Mail)

/blc

v.	:	DOCKET NO. WEST 85-98-RM
	:	Citation No. 2358524; 3/20/85
	:	
RY OF LABOR,	:	Docket No. WEST 85-97-RM
SAFETY AND HEALTH	:	Citation No. 2358525; 3/21/85
ISTRATION (MSHA),	:	
Respondent	:	Docket No. WEST 85-99-RM
	:	Citation No. 2356413; 3/21/85
	:	
	:	Docket No. WEST 85-100-RM
	:	Citation No. 2356414; 3/21/85
	:	
	:	Climax Mine
	:	
	:	
RY OF LABOR,	:	CIVIL PENALTY PROCEEDING
SAFETY AND HEALTH	:	
ISTRATION (MSHA),	:	Docket No. WEST 85-120-M
Petitioner	:	A.C. No. 05-00354-05510
	:	
v.	:	Climax Mine
	:	
	:	
MOLYBDENUM COMPANY,	:	
Respondent	:	

DECISION

nces: Richard W. Manning, Esq., Climax Molybdenum Company,
Greenwich, Connecticut,
for Contestant/Respondent;
Robert J. Lesnick, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Respondent/Petitioner.

Judge Carlson

These consolidated proceedings arose out of inspections con-
ducted by representatives of the Secretary of Labor (hereafter
"Secretary") at the underground molybdenum mine operated by
Climax Molybdenum Company (hereafter "Climax") at Climax, Colorado.
Inspections took place on March 20 and 21, 1985. The in-
spector issued five citations for violations of mandatory safety
rules promulgated by the Secretary. Each of these citations
was contested by Climax. Later, the Secretary proposed
proposals for the alleged violations. These proposals appear in

visions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (hereafter "the Act"). Both parties filed post-hearing briefs.

WEST 85-96-RM, Citation No. 2358524

Inspector Jake DeHerrara issued this citation on March 20, 1985, because openings in a flume board constituted an alleged falling hazard under 30 C.F.R. § 57.11-12. 2/ That standard provides:

Openings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed.

The evidence shows that the cited condition existed at or near a switch-point on the railroad which runs through an underground haulage drift. The flume is a shallow ditch-like drain which parallels the track and drains water from the mine. The top of the flume is covered by boards (two adjacent 2 by 12's) to keep debris from entering the flume and clogging it.

The evidence also shows that the haulage drift is approximately 12 feet wide with the track running down the center. The track is 3 feet in width, measured between the rails, which leaves about 4 feet of open drift floor on the side of the track opposite the side where the flume is located.

Witnesses for both parties agreed that the miners walking through the haulage drift frequently use the flume boards as a walkway because they generally offer the smoothest surface. On the other hand, miners may also walk on the opposite side of the rails, or between the rails. The drift floor is often wet and muddy, and is, by its nature, rough and uneven.

1/ Originally, Docket No. WEST 85-98-RM was included in the consolidation. That contest was withdrawn by Climax at the hearing, however, and was severed for disposition by separate order issued on January 21, 1986.

While Climax concedes that the opening existed, it adduced testimony through one of its own safety inspectors, Mr. Kenneth Johnston, that the switch openings were necessary to furnish access to the switches to clean out debris. Storke level railroad switches number about 100, according to Johnston, and only a small number of these are covered. About half, however, do not cross flume boards as does the one cited. Those which are covered, Climax's safety and health manager Dan Larkin testified are generally on curves or at other points where debris from the loads of passing cars is likely to sift into the openings and interfere with the switches' operation (Tr. 85). Larkin maintained that it was "possible" but not "practical" to cover the part of the switch openings between the tracks because the cover would interfere with operation of the switches (Tr. 51-52). He acknowledged, however, that the part of the opening outside the rails (between the throw lever and the nearer track) could be covered (Tr. 68).

The undisputed evidence showed that a second and somewhat smaller opening existed in the flume boards near the opening for the throw rod. This opening was also about 14 inches long and its width varied between 7 and 4 inches. It, too, was 14 inches deep. Here it appeared that the flume board had simply been broken (Tr. 36). The relative location of the two openings is shown plainly in the photograph received as government exhibit and the sketch received as Climax's exhibit 2.

The inspector believed that the openings in the boards presented a clear falling hazard to miners walking the flume boards. He testified that a walker's foot could easily enter the opening causing a broken or sprained leg or foot (Tr. 18, 2). He emphasized that the haulageway was not lighted except by the miners' cap lights. The uneven illumination source increased the danger, he believed. That the haulageway was not otherwise lighted is not disputed.

Climax disagrees with the entire thrust of the inspector's presentation insofar as the hazard was concerned. Mr. Johnston expressed great doubt that any part of a miner's body would actually drop through one of the openings causing an injury. 3/

step into the opening. Johnston testified that the opening was 1-1/2 inches, and on the other was 8 inches, he testified.

Johnston also suggested that the inspector's focus on flume-board openings was unrealistic since the haulageway floor was inherently uneven, and obstacles were common. He mentioned standing water in depressions, rocks, and openings between the railroad ties. The Secretary has not denied that these features were present. In framing its legal argument on this matter, Climax states in its post-hearing brief:

In determining whether a particular opening constitutes a violation of 57.11-12, it is crucial to consider the location of the opening. An opening of 8 by 14 inches in the floor of a 5-foot wide elevated walkway may constitute a violation, while another opening of the same dimensions at a different location would not. (Climax's brief at 4.)

Further, Climax contends that the openings were not a citable hazard because in its safety meetings the company routinely warned miners to exercise care in walking the drift, particularly around switches (Tr. 40-42). Referring to the miners, Mr. Johnston stated: "They're told to be very observant and keep your [sic] eyes open where you're going" (Tr. 41).

Finally, Climax contends that its history of falling accidents in haulage drifts showed that the openings were not a hazard. In this regard, Dan Larkin, the company's manager of safety and health, testified that approximately 20 to 25 percent of all accidents at the mine since 1979 had been slip-and-fall incidents. In the same period, however, only about 5 percent of these occurred in haulage drifts. None involved falls through openings around track switches (Tr. 87-88).

I must conclude that the preponderant evidence establishes a minor violation of the cited standard. Climax's argument that the hazard presented by the openings in the flume boards constitutes no greater danger than the uneven floor of the drift generally, or the danger of walking the railroad ties - conditions which the inspector doubtless saw but did not cite - deserves serious consideration. It would be naive, certainly, to expect a drift of the sort we deal with here to be as smooth and obstacle-free as an office-building corridor. The chief difficulty with Climax's position is that the flume boards presented themselves as an inviting walkway. The evidence convinces me that, overall, they offered the smoothest walking surface in the drift. That

back switches; they may be remedied. Climax acknowledges that some of the switch openings were covered at the time of citation. This greatly weakens its argument that use of covers was "impractical." Rather, it appears that it was practical to cover the openings where accumulation of debris was a problem, and impractical to do so where it was not. The question appears more one of mere convenience than practicality.

It must also be noted that the smaller opening complained of in the citation had nothing to do with a switch. Instead, the boards had apparently simply been broken off and not repaired or replaced. Where flume boards are offered as a travel way, it is incumbent on the mine operator to keep them in decent repair.

We now turn directly to the question of whether either of the two openings was large enough to represent a realistic possibility that a miner's foot could fall through, thus violating the standard. I must agree with Climax that the chances of this happening are not great. I further agree that even if a miner's foot did encounter one of the openings, the openings were narrow enough that the foot might not fall through. On the other hand, Climax acknowledges that it is possible that a foot could drop into the openings and that injury could ensue. From simply looking at the openings as depicted in the photographs and sketches in evidence, I must conclude that there is a realistic possibility that a foot, or a part of one, could drop through. That is sufficient to establish violation.

Climax's argument concerning safety education and the miner's familiarity with switch openings and other walking hazards in the drift does not constitute a defense. Where a standard prescribes certain protective measures to eliminate hazards, a cautious shift of mind cannot be substituted for those measures.

The operator's favorable injury record of falling incidents in the haulage drifts is commendable, but again is no defense. It bears instead upon the severity of the violation.

The Secretary's citation classifies the violation as "significant and substantial" under section 104(d) of the Act. In Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981), the Commission defined such a violation as where "... there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Although I am satisfied by the evidence that the falling hazard contributed

the broken bones, or severe sprains or dislocations. The violation cannot, therefore, qualify as significant and substantial.

The Secretary proposes a penalty sum of \$91.00 for this citation. The parties have stipulated, however, that should the violation be found non-significant and substantial, the appropriate penalty would be \$20.00.

The record contains evidentiary facts or stipulations regarding the six elements to be considered under section 110(i) of the Act in assessing penalties. These need not be detailed here. It is enough to say that nothing in the record shows the stipulated amount is inappropriate. A civil penalty of \$20.00 will therefore be assessed.

WEST 85-97-RM, Citation No. 2358525

This citation nearly duplicates that discussed immediately above. Inspector Jake DeHerrera issued it on March 21, 1985, for another opening in haulage drift flume boards. This, too, was an alleged violation of 30 C.F.R. § 57.11-12.

The evidence shows that this opening measured 14 inches deep by 31 inches long and up to 5 inches wide. The only significant difference between the circumstances here and those in the previous citation may be summarized as follows: the opening is not at or near a railway switch; the opening had a cover, but it had been lodged and was leaning against the rib, rather than being in place; the longest dimension of the opening ran the length of the flume boards, rather than across them; and the foot traffic could be expected to be less, consisting primarily of six electricians headquartered in a nearby shop area.

In terms of the existence of a violation, none of these differences would alter the result reached for the earlier citation. The defenses are essentially the same (except for those relating exclusively to switch openings), and are insufficient for the result discussed in connection with that citation.

If anything, the circumstances here are slightly more favorable to the Secretary. This is so because the opening had previously been covered.

Nevertheless, this violation does not rise to the "significant and substantial" level. The credible evidence shows that while injuries are reasonably foreseeable,

On March 21, 1985, Inspector Elmer Nichols, acting on behalf of the Secretary, issued a citation charging that Climax was in violation of the mandatory safety standard published at 30 C.F.R. 57.3-22. 4/ That standard provides:

Miners shall examine and test the back, face, and rib of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary.

The alleged violation took place in one of the fingers rising from a slusher drift. (See joint exhibits 4 and 5.) The finger was not in use at the time. A concrete safety plug had been in place at the upper end. On the day prior to the inspection, miners had set and shot one round of explosives in the plug, bringing it down. Their purpose was to remove the plug in order to bring the finger back into production. Miners were continuing the removal work when the inspector arrived at about 10:00 a.m. on the morning of his inspection. These background facts were not in dispute.

According to Inspector Nichols, when he and Inspector DeHeer arrived at the base of the finger, a miner, Kelly Kramp, had just ascended a set of ladders after having drilled the face of the finger preparatory to setting a second round of charges.

At about that time a "handful" of small bits of rock dribbled down from somewhere, convincing him that the finger was beginning to "work." He then noticed a piece of concrete in the face which appeared to him "quite loose." He described it as about the size of a basketball, and estimated its weight at between 50 to 60 pounds.

He was immediately concerned that the rock could come down. DeHerrera and he left very briefly and went to a nearby lunch-room where he wrote out the citation for violation of 30 C.F.R. 57.3-22. He advised that Kramp and the other miner in the crew, Nick Doran, should not go back up to load holes until the offending piece of cement was barred down.

The inspector explained that because of the location of the loose cement he was not concerned that it would fall directly on the miner or the ladder. Rather, he testified, it would likely fall on the 4 by 4 wooden brace upon which the upper ladder rested. This, in turn, would cause the miner and his equipment to fall to the concrete base of the finger.

Inspector Nichols maintained that when he returned from the slusher drift (or dash) at about 10:10 a.m. the piece of concrete had been brought down. He made it clear that the single piece of concrete (a part of the plug which did not come down in the original blasting of the plug) was the only part of the face which he deemed a hazard.

Mr. Kelly Kramp was called as a witness by both the Secretary and Climax. His assessment of the stability of the piece of concrete differed markedly from the inspector's. Kramp testified that when he reached the finger on the morning in question he first checked for misfires from the previous round. He then barred down until he was certain any loose material had been removed. Then, he testified, he proceeded to drill for the second round. Kramp agreed that the inspectors appeared just after he had completed the drilling. He denied that he had seen any materials fall while the inspector was there, but conceded that the "handful" could have fallen and escaped his notice. He did acknowledge that some dribbling of "fines" or "sands" had occurred earlier when he was drilling. This he insisted was common when drilling a safety plug after a first round had been fired. In this case he suggested it was caused by movement in the finger attributable to a combination of drill water, drill vibration and drill air. He believed that most of it was small bits of muck loosened by the first blast which had come to rest on a narrow bench he had created just below the face to facilitate preparation for the setting of the first charge.

All in all, Kramp was certain that although dribbling of muck materials could sometimes presage a major movement in muck or on a finger, what he saw on March 21 was not of that sort. Rather, it was no more than what was to be anticipated from a stable face.

of concrete was partly supported by the concrete forming or ribs of the finger itself.

Ken Johnston, the Climax safety inspector who accompanied federal inspectors, testified briefly for the operator. with Kramp's assessment. He could see nothing indicating that the piece of concrete was loose or unstable. He also stated that the few "pebbles" coming down seemed "inconsequential."

Secretary presented no evidence tending to show that he failed to bar down at the beginning of the shift. The Secretary did suggest at one point that there had been a failure to inspect and test "frequently thereafter." There is no evidence, however, to support that assertion. Similarly, Inspector Nichols acknowledged that there was no question of supervisory negligence in performing daily visits. Thus, the only relevant standard is that which declares:

Loose ground shall be taken down
or adequately supported before any
work is done.

The parties' versions of the facts are not greatly divergent. The question of violation actually turns on the validity of their respective opinions. Whose judgment, Inspector Nichols's or Mr. Kramp's, is entitled to acceptance? One claims the cement appeared loose; the other insisted it was not. That determination is difficult because both men are highly experienced hardrock miners, well-qualified to make such judgments.

After weighing the matter, I conclude that the Secretary has the burden to carry his ultimate burden of proof. I reach this conclusion for several reasons. Although Inspector Nichols had great familiarity with work in raises, he had no prior specific experience with the reopening of fingers which had been safety-plugged. Mr. Kramp, by contrast, had 10 years of experience working in raises, five of which involved removing safety plugs. Beyond that, the inspector reached his judgment after seeing the allegedly loose piece of concrete briefly and from a distance. Kramp not only looked at it at close range, but ultimately barred it down. The fact that it took two miners, Kramp and Doran, at least a few minutes to bar down the relatively small piece of cement shows that it was stable. None of this would be persuasive, however, if the truth of Kramp's testimony were somehow suspect. In regard, I note that at the time of the hearing Kramp had not been at Climax for five months. If he had any reason to

This citation concerns the ladder arrangement used by Mr. Kramp to reach the concrete plug in the finger discussed in the previous citation. Inspector Nichols observed that miners had used two six-foot folding stepladders. These ladders remained in the closed or folded position. Mr. Kramp had leaned them against the concrete side of the finger, which rose from the floor at a 45-degree angle. The feet of the rear legs of the lower ladder rested on the floor. The feet of the upper ladder were spaced 46 inches above the top step of the lower ladder. They rested on a 4 by 4 inch wooden brace. Neither ladder was fastened to the finger by any means. (See sketch, government exhibit 8.)

Inspector Nichols believed this arrangement violated the standard published at 30 C.F.R. § 57.11-1. 5/ That standard provides:

Safe means of access shall be provided and maintained to all working places.

In his testimony, Nichols expressed a number of concerns about the safety of the ladders. Chief among these were the following: that the ladders were designed to be self-standing, not to be leaned; that unsecured, the ladders were unstable and, under load, could slip to one side or the other, causing a climbing miner to fall; that the top step of the lower ladder was cracked; and that the 46-inch gap between ladders, where no steps were provided, created a separate and significant hazard.

He also maintained that the necessity for Mr. Kramp to carry a 125-pound drill up the ladder increased the overall hazards. As proper practice, the inspector claimed, was to use a single "mine ladder" to reach the workplace. He contended that the folded stepladder, resting on its back legs alone, was inherently less stable than the miner's ladder. This was so, he testified, because the steps at 12-inch intervals between the heavy side rails of the single ladder lent those rails more rigidity than the slender back legs of the stepladder. Only the front legs of the stepladder were meant to bear the weight of a climber, while the back legs were designed merely to support the ladder itself.

ladders. This, he said, gave the stepladders a superior footing when the ladder had to be leaned at a 45-degree angle, and allowed the climber more toe space because of the offset provided by the rear legs. He further insisted that the top step was sound when he ascended the ladder; it cracked, he said, when he dropped the left leg on it as he started to descend.

The Climax safety manager, Mr. Larkin, testified that he could see no problem with the ladder arrangement.

Counsel for Climax points out that since the standard prescribes no specific measures to achieve "safe access," safe compliance must be gauged by whether the access used by the company would inspire corrective action in a "... reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry...." Alabama By-Products Corporation, 4 FMSHRC 2128, 2129 (December, 1982).

The test is the correct one. I must conclude, however, that a reasonably prudent person confronted with the ladder arrangement used by Climax would judge it unsafe. I do not reach this conclusion based upon the inspector's concerns about the inherent design differences between folding stepladders and miners' ladders. The inspector's testimony in that regard was weakened by his admission that had the safety of the lower ladder been the only issue, he would have found it satisfactory except for the broken top step. (Ex. r. 307-308, 321, 324.)

The hazard revealed by the evidence was the use of the two ladders with a 46-inch gap between the two. Mr. Kramp maintained that he could easily and safely climb the lower ladder with a 35-pound jackleg drill over his shoulder, sling the drill off his shoulder and onto the 4 by 4 brace supporting the second ladder, and then somehow pull himself up onto the brace where he would stand to drill. This testimony is simply not credible. One way or another, he had to climb the last 46 inches of a 45-degree concrete wall without steps and without ladder rails to grasp to balance himself. The maneuver would be hazardous without a heavy drill being carried. With the drill, it was even more dangerous because of the gap between the upper and lower ladders, the standards clearly violated.

The parties have stipulated that for those violations which are found to exist, and which are also found to be "significant and substantial," the civil penalties proposed by the Secretary are appropriate and should be imposed. The stipulation appears reasonable. Consequently, a civil penalty of \$98.00 will be assessed.

CONCLUSIONS OF LAW

Based upon the entire record herein, and in accordance with the determinations of fact contained in the narrative portions of this decision, the following conclusions of law are made:

(1) The Commission has jurisdiction to decide this consolidated matter.

(2) Climax violated the mandatory safety standard published at 30 C.F.R. § 57.11-12 as alleged in citation number 2358524.

(3) The violation was not "significant and substantial" within the meaning of the Act.

(4) The reasonable and appropriate penalty for the violation is \$20.00.

(5) Climax violated the mandatory safety standard published at 30 C.F.R. § 57.11-12 as alleged in citation number 2358525.

(6) The violation was not "significant and substantial" within the meaning of the Act.

(7) The reasonable and appropriate penalty for the violation is \$20.00.

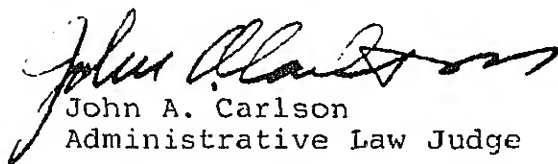
(8) Climax did not violate the mandatory safety standard published at 30 C.F.R. § 57.3-22 as alleged in citation number 2356413.

(9) Climax violated the mandatory safety standard published at 30 C.F.R. § 57.11-1 as alleged in citation number 2356414.

(10) The violation was "significant and substantial" within the meaning of the Act.

(11) The reasonable and appropriate penalty for the violation is \$98.00.

to pay total civil penalties of \$138.00 to the Secretary
30 days of the date of this decision.



John A. Carlson
Administrative Law Judge

tribution:

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